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In The

Supreme Court of the United States

October Term, 1993

MAINLANDS SECTION 1 AND 2 CIVIC ASSOCIATION, INC.,

Petitioner,

vs.

JOSEPH W. MASSARO and PATRICIA ANN MASSARO, individually and as parents and next friend of Joseph P. Massaro and UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Fair Housing Amendments Act of 1988 creates a "housing for older persons" exemption from the prohibition against familial status discrimination. This case involves an important question of federal law and national fair housing policy which should be resolved by this Court: Does the fact that a retirement community which allows the entry of incoming households under 55 years of age, while at all times maintaining in excess of 80% occupancy by persons 55 years of age or older, defeat the community's exempt status as housing for older persons?

II. Did the appellate court deviate from the proper standard of review by impermissibly substituting its judgment for that of the trier of fact and reweighing the evidence to overturn a trial court finding that a community demonstrated the requisite intent to provide housing for older persons?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 3 F.3d 1472. It is reproduced in the Appendix to this Petition, at Appendix B, page 3a along with the Order Denying Rehearing, at Appendix A, page 1a.

The opinion of the United States District Court for the Southern District of Florida is reported at 796 F. Supp. 1499. It is reproduced in the Appendix at Appendix C, page 25a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1993. A timely-filed Petition for Rehearing was denied on February 1, 1994. This Petition was timely filed pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

STATUTORY PROVISION AND REGULATIONS INVOLVED

The pertinent text of 42 U.S.C. § 3607(b) of the Fair Housing Amendments Act of 1988 is reproduced in Appendix E, page 70a.

The pertinent text of HUD Regulations regarding housing for older persons exemption, 24 C.F.R. § 100.304, *et seq.*, is reproduced in Appendix F, page 72a.

STATEMENT OF THE CASE

At trial, the District Court found that Petitioner, Mainlands Section 1 and 2 Civic Association, Inc. (hereinafter "Association")[1] had over 80% of its lots occupied by at least one person 55 years of age or older, had significant facilities and services specifically designed to meet the physical or social needs of older persons, and had published and adhered to policies and procedures demonstrating an intent to provide housing for persons 55 years of age or older. Therefore, the District Court found that the

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1. Petitioner Association has no parent companies or subsidiaries.

Association qualified for the "housing for older persons" exemption and could enforce its restriction against permanent occupancy by children. The District Court's finding of intent was the sole issue appealed.

The Court of Appeals reversed the District Court's finding that the Association established sufficient policies and procedures to prove an intent to provide housing for older persons and qualified for the "housing for older persons" exemption under the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3607(b).

The United States District Court for the Southern District of Florida had subject matter jurisdiction of the case below pursuant to 28 U.S.C. §§ 1331, 1343(a)(4) and 42 U.S.C. § 3613. The Court of Appeals for the Eleventh Circuit had jurisdiction over the appeal from the District Court's final decision pursuant to 28 U.S.C. § 1291.

On April 12, 1990, the Massaros filed a complaint with HUD and sued the Association for violating the familial status provisions of the Fair Housing Amendments Act of 1988 because the Association sent a letter to the Massaros on September 26, 1989, stating that the presence of the Massaros' child violated the Association's Declaration of Restrictions against permanent occupancy by persons under 16 years of age. (R. 1-1[2]; R. 1-17).

On September 7, 1990, the Association sent a similar letter to Carrie and Gary Mirabile. The Mirabiles filed a complaint with HUD in October 1990, alleging the Association had engaged in familial status discrimination.

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2. Record citations "R.__ at __" are by volume, docket number and, where appropriate, page number. References to "Tr.__" are to page numbers of the four volume trial transcript. "D. Ex. __ at __" refers to the defendant's trial exhibits, with page numbers where appropriate.

The Association defended on the basis that it qualified for the "housing for older persons" exemption under federal law and, therefore, the Association could continue to keep families with children out of their bona fide, legitimate retirement community. HUD determined there was reasonable cause to believe discrimination had occurred.

On August 14, 1991, the United States filed suit on behalf of the Massaros and the Mirabiles. (R. 7-1). On October 21, 1991, the District Court consolidated the United States' lawsuit with the Massaros' lawsuit. (R. 4-99).

After a four-day bench trial in April 1992, the District Court found that the Association established sufficient policies and procedures to prove an intent to provide housing for older persons. On that basis, the court ruled that the Association qualified for the "housing for older persons" exemption and was, therefore, exempt from the familial status provisions of the Fair Housing Amendments Act of 1988. (Tr. 923-960; R. 6-171; Appendix D). The District Court entered a Final Judgment in favor of the Association on June 10, 1992. (R. 6-172). The United States and the Massaros appealed the District Court's decision to the Eleventh Circuit Court of Appeals. The Eleventh Circuit reversed stating that the record lacked supporting evidence at the time of the discriminatory acts.

On appeal, the Massaros and the United States stipulated that the Association met the 80% population requirement and the facilities and service requirement of the "housing for older persons" exemption. Therefore, the sole issue on appeal was whether the Association had proved the third prong of the exemption: the publication of and adherence to policies and procedures which demonstrate an *intent* by an owner or manager to provide housing for persons 55 years of age or older.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE REQUIRES THIS COURT TO: (1) DECIDE THE APPROPRIATE CONSTRUCTION OF THE FAIR HOUSING AMENDMENTS ACT OF 1988 DESIGNED TO PROTECT RETIREMENT COMMUNITIES AND PROVIDE FAIR HOUSING THROUGHOUT THE UNITED STATES; AND (2) DETERMINE THE APPROPRIATE STANDARD OF APPELLATE REVIEW OF A TRIAL COURT'S FINDING THAT AN OWNER OR MANAGER HAD THE INTENT TO PROVIDE HOUSING FOR PERSONS 55 YEARS OF AGE OR OLDER TO QUALIFY FOR THE "HOUSING FOR OLDER PERSONS" EXEMPTION UNDER 42 U.S.C. § 3607(b)(2).

A. Federal Law and Legislative Intent Permit "Housing for Older Persons"

The stated intent of Congress in promulgating the Fair Housing Amendments Act was to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. § 3601. The American dream to have affordable housing also applies to older people who have completed their work life experience and hope to live their golden years in fellowship with their contemporaries. (Tr. 923, Appendix D, p. 40a).

The interpretation of the "housing for older persons" exemption regarding *intent* was an issue of first impression in the Eleventh Circuit and is an important question of federal law which should be settled by this Court in furtherance of the national fair housing policy enunciated in the Fair Housing Amendments Act of 1988. This is an issue of great public importance since it affects retirement communities throughout the nation which seek the "housing for older persons" exemption.

In creating the exemption, Congress sought to protect those retirement communities intended for and principally occupied by the elderly. The aim of Congress was not to disrupt the lives of senior citizens or the operation of legitimate retirement communities. 134 Cong. Rec. H4682 (Daily Ed., June 23, 1988).

If a community qualifies for the "housing for older persons" exemption, it has every legal right to exclude children from its community. There is nothing illegal, suspect, inconsistent, or improper for a community which qualifies for the "housing for older persons" exemption to continue to exclude children from residing in the community.

B. HUD Regulations Require Only 80% Compliance With the Upper End Age Restriction

In order to enforce a complete ban against permanent occupancy by children and maintain a housing community for older persons', a community need show only 80% compliance with the upper end age restriction. Federal law does require 100% occupancy by persons 55 years of age or older. Accordingly, in requiring the Mainlands to have a 100% new occupancy rate, the appellate court misapprehended and misconstrued the "housing for older persons" exemption.

The appellate court concluded that the Mainlands did not have a credible process of enforcing and adhering to its By-Laws sufficient to demonstrate its intent to provide housing for older persons because some persons under 55 moved into the community and were not evicted. In so finding, the appellate court ignored the Association's By-Laws which expressly provide in pertinent part:

> . . . it being the intent that at least 80% of the lots shall have at all times at least one resident fifty-five (55) years of age or older.

Moreover, the appellate court overlooked the trial court's factual finding that the Association's actual practice was consistent with its stated intent in the By-Laws Amendment. More specifically, the trial court found that the Association was in compliance with its stated intent, since the Mainlands never fell below the 80% population requirement. The federal statute and HUD regulations require only 80% occupancy by persons 55 and over and specifically enable an owner to provide housing to under-55 *incoming households* without losing the exemption as long as the 80% minimum requirement is still met. (Appendix F, pp.75a-80a).

A community can qualify for the "housing for older persons" exemption, if its present occupants in 80% of the lots are over 55 years of age. Even if a community did not have 80% of its lots occupied by persons 55 or over, it could qualify under the transition provision of the Act if *80%* of the *new* occupants are over 55. Mainlands was not seeking the exemption under the transition provision of the Act because before the federal law was passed, over *90%* of the residents were 55 years of age or older. Since previous occupants already met the age requirement, there was no requirement under the federal statute or regulations for the new residents to meet the age limit, if their presence did not bring the community below 80%.

A court must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc.,* 104 S. Ct. 2778, 2781, 467 U.S. 837, 81 L. Ed. 2d 694 (1984). Congress clearly expressed its intent to protect bona fide, legitimate retirement by enacting the "housing for older persons" exemption. *See* discussion of *Seniors* case, *infra.* Congress expressly mandated that the Secretary of HUD develop regulations in determining whether housing qualifies as housing for older persons under the 55 or over housing subsection. 42 U.S.C. § 3607(b)(2)(C). (Appendix E, p.70a).

Consistent with its congressional mandate, the Secretary of HUD promulgated regulations for 55 or over housing at 24 C.F.R. § 100.304. (Appendix F). The HUD regulations construing the "55 or over" section to allow under-55 incoming households are consistent with the express language of the statute that imposes a minimum 80% occupancy requirement for persons 55 years of age or older rather than a 100% new occupancy rate. The HUD regulations state that the purpose of the "housing for older persons" exemption is to not unfairly limit housing choices for elderly persons. (Appendix F, p.77a). Within those regulations, the Secretary cited examples which were illustrative of the application of the 55 or over section. (Appendix F, pp.75a-77a). In one such example, HUD stated that a housing provider could allow occupancy by an *under-55 incoming household* without losing the "55 or over" exemption, as long as the community did not fall below the 80% minimum requirement. (Appendix F, pp.79a-80a).

According to the HUD regulations, the entry of under-55 persons into a community does not bar the community from qualifying for the "55 or over" exemption. By failing to defer to the administrative agency's reasonable interpretation of the statute found in the regulations, the appellate court departed from the rules of statutory construction. *See Melian v. Immigration and Naturalization Service,* 987 F.2d 1521, 1525, fn.6 (11th Cir. 1993); *Caro-Galvan v. Curtis Richardson. Inc.,* 981 F.2d 501, 507 (11th Cir. 1993); *Habersham Mills v. Federal Energy Regulatory Commission,* 976 F.2d 1381, 1383 (11th Cir. 1992); *Chevron, supra,* 104 S. Ct. at 2782.

A court may not substitute its own construction of a statute for a reasonable interpretation already made by the enforcing agency. *Chevron,* 104 S. Ct. at 2782. The regulations are clear that a community of 55 or over housing for older persons does not preclude admission by persons *under 55* years of age as long as the 80% minimum requirement is still met.

The facilities and services requirement and the 80% population requirement of the "housing for older persons" exemption are direct evidence of the manner in which a community is operated for occupancy by persons 55 years of age or older. These two prongs demonstrate who is living in the community (older persons) and the type of lifestyle offered to them (retirement living). The Respondents had no choice but to stipulate to these two prongs because the Mainlands is a bona fide retirement community. The third prong of the exemption focuses on the owner or manager's *intent,* which is a question of fact to be resolved by the trier of fact who has had an opportunity to see the evidence and hear the testimony of the witnesses first hand.

The appellate court also erred in relying upon *HUD and Lawson v. TEMS Association, Inc.,* Fair Hous. - Fair Lend. Rep. (P.H.) ¶ 25,028 (H.U.D. ALJ 1992) to support the proposition that a housing association has inadequate policies and procedures to qualify for the "housing for older persons" exemption, if it allows persons under 55 years old to inhabit homes. The *TEMS* case is factually distinguishable because the trier of fact found that the 80% population requirement was not met, the age documents were filled with errors, and *the failure of the community to keep people out below the age of 55 brought the community below the 80% threshold.* Federal law only requires an 80% compliance with the upper end 55-age restriction in order to continue to enforce a complete ban against children under 18. The appellate court has erred in applying the law to the facts because the appellate court has ignored the plain meaning of the statute and the regulations from the enforcing agency, HUD, which only require a community to meet the 80% minimum threshold. This misapprehension of the law improperly imposes a greater burden of occupancy on Mainlands than federal law dictates.

A community has the flexibility to utilize a portion of its 20% buffer zone for incoming households. The preamble to the final rule

implementing the Fair Housing Amendments Act of 1988 (published Jan. 23, 1989) provides the discussion of the 20% buffer zone, indicating that a community could allow an incoming household under 55 years of age to occupy a home in the community, reducing the percentage of units occupied by at least one person 55 years of age or older to just a fraction above 80%, without losing the "55 or over" exemption. (Appendix F, pp. 79a-80a).

Not only did the appellate court misapprehend the law, but it overlooked the uncontradicted evidence which established that the Mainlands had at all times maintained the statutorily imposed 80% population requirement and, in fact, well exceeded that requirement, having in excess of 90% of the lots occupied by at least one person 55 years of age or older. Nowhere in the federal statute or HUD regulations does it suggest that a community is acting inconsistent with its intent to provide housing for older persons if it allows persons under 55 years of age to move into the community while over 90% of the homes are occupied by persons 55 years of age or over. If that were the case, a community would always have to have 100% over-55 occupancy to show its intent to maintain its legal exemption, and such a position would be inconsistent with the intent of Congress, the express language of the "55 or over" statute, and the HUD regulations which permit under-55 incoming households.

C. The Association's By-Laws and Practices Were Consistent With Local Law

The preamble to the HUD regulations states as follows:

> A housing provider may use any non-discriminatory method of qualifying for the exemption that comports with applicable State and local laws. Since the Fair Housing

> Amendments Act does not prohibit discrimination because of age, nothing in the Act prohibits a housing provider seeking to qualify for the exemption for '55 or over' housing from setting age restrictions that are *more* stringent than those set forth in the Act. Thus, a housing provider *may*, for example, require that *all* residents be 55 years of age or older, provided that such a rule is consistent with applicable State and local laws.

Prior to the March 13, 1990 amendment to the Broward County Human Rights Act (Chapter 83-380, Laws of Florida) it was *illegal* for the Association to deny housing opportunities to persons over the age of 18 .

Since the local Broward County ordinance prohibited age discrimination in housing, it was *illegal* for the Mainlands to restrict housing to persons between the ages of 18 and 55. There was no *non-discriminatory* method for the Association to use in qualifying for the federal exemption until the Broward County ordinance was changed by referendum effective March 13, 1990. Thus, the Mainlands cannot be faulted for not amending its documents to exclude persons between the ages of 18 and 55 *prior to March 13, 1990.*

II.

THIS CASE CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN DETERMINING WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND ERRED IN REVERSING THE DISTRICT COURT'S JUDGMENT FOR THE DEFENDANT BY IGNORING PERTINENT LANGUAGE IN THE HUD REGULATIONS, AND SUBSTITUTING ITS JUDGMENT FOR THAT OF THE TRIER OF FACT IN CONCLUDING THAT THE EVIDENCE DID NOT PROVE AN INTENT TO PROVIDE HOUSING FOR OLDER PERSONS.

The appellate court held that the Association failed to prove its intent to provide housing for older persons due to inadequate age verification procedures and the failure to enforce and adhere to policies to provide housing for older persons. In so doing, the appellate court ignored the trial court's factual findings and the parties' stipulation on appeal.

More specifically, the appellate court erred in concluding that the Association had inadequate age verification procedures because those same procedures conclusively established that over 90% of the homes were occupied by persons 55 years of age or older, and there was absolutely no guidance in the statute or regulations as to what constituted adequate age verification procedures. Furthermore, the parties stipulated on appeal that Mainlands had met the 80% population requirement.

The appellate court further erred in concluding that the Association failed to enforce or adhere to its policies simply on the basis of the entry of under-55 persons into the community.

HUD regulations expressly permit a 20% buffer zone to be used for incoming households. (*See* Appendix F, pp. 79a-80a). The trial court, read the HUD regulations and gave the proper deference to HUD's interpretation of the statute in the regulations, as the enforcing agency. The trial court found that the Mainlands did *at all times* maintain *in excess of the 80%* requiment. The appellate court impermissibly substituted its judgment for that of the trial court. The district court, having read the HUD regulations and giving due deference to HUD's interpretation as the enforcing agency, found that the *Mainlands did not have to enforce the 55 or over restriction to the extent that they stayed above the 80 percent.* (Tr. 952; Appendix D, p. 63a).

A. Factual Findings of the Association's Intent

The District Court, as the trier of fact in the non-jury trial, made a finding of fact that the Association had the intent to provide housing for older persons. With respect to the development of the Mainlands community in the sixties, and based upon the brochures and the type of neighborhood that was developed, the District Court had no doubt that the developer intended the homes to be for people who were either retirement age or close to retirement age. (Tr. 926; Appendix D, p. 43a).

The District Court stated that the whole thrust of the Mainlands community is designed for older people and for their interest and their activities. (Tr. 935; Appendix D, p. 50a). The District Court made a finding of fact that over 90% of the homes were occupied by persons 55 years of age or older. (Tr. 938; Appendix D, p. 52a). The District Court also found that ". . . the intent of the civic association is to keep it exactly the way it is. And what is it? It is a community of probably 90 percent of the people who are over 55." (Tr. 950; Appendix D, p. 61a). The District Court further stated ". . . all I can gather is these people had every intent to keep this a community over 55. . ." (Tr. 951; Appendix D, p. 62a).

The District Court described the Mainlands as a neighborhood having a 25 year history of serving the needs of older people. (Tr. 954; Appendix D, p. 64a). The District Court also found that the Mainlands was "... providing the type of environment that appealed to the people who were living there, and the people were living there, at least 90 percent I find over 55." (Tr. 954; Appendix D, p. 65a).

The District Court's findings of fact are viewed under a clearly erroneous standard. Rule 52(a), Fed. R. Civ. P. The appellate court may affirm the District Court where the judgment entered is correct on any legal ground, regardless of the grounds addressed, adopted, or rejected by the District Court. *Barnett v. Bailey,* 956 F.2d 1036 (11th Cir. 1992).

The appellate court expressly acknowledged that "the federal statute and regulations are more concerned with the intent of the community." (Appendix B, p. 19a). "Intent" is a question of fact to be resolved by the trier of fact. *Dees v. City of Miami,* 747 F. Supp. 679 (S.D. Fla. 1990).

B. Association's Internal Operations

In concluding there was a lack of supporting evidence in the record to demonstrate Mainlands' intent to be housing for older persons, the appellate court limited its review to the following criteria under the HUD regulations: age verification procedures, written rules and regulations and actual practices of the owner or manager in enforcing relevant rules or regulations. However, in reaching that conclusion, the appellate court ignored relevant language in the preamble to the regulations. The preamble to the regulations states that the policies and procedures for the housing facility *as a whole* must demonstrate an intent to provide housing for persons 55 years of age or older, and that the housing in question must in its marketing to the public and in its *internal*

operations, hold itself out as housing for persons age 55 years or older. 134 Cong. Rec. S10456 (Memorandum of Senators Kennedy and Specter regarding their substitute amendment) (emphasis added).

This is consistent with the testimony of HUD's representative, Kathelene Coughlin, who testified that the Government reviews *everything* in evaluating policies and procedures demonstrating the intent to provide housing for older persons. Specifically, Ms. Coughlin testified that:

> We would include all written procedures, practices, policies that the respondent has at the time of the alleged act of discrimination. We would include everything. That would include advertisements. That would include bylaws. That would include covenants and restrictions. That would include written instructions to the residents that some communities send out. It would include everything.

(Tr. 474-475).

Mainlands 1 and 2, through its internal operations as a whole, held itself out as a retirement community. The types of acceptable policies and procedures recognized under the Act will necessarily vary from community to community, given the needs and desires of older persons which may be as diverse as those of other segments of society. *Taxpayers Association of Weymouth Township v. Weymouth Township,* 364 A.2d 1016 (N.J. 1976).

In reaching its erroneous conclusion that the Association failed to demonstrate its intent to provide housing for older persons, the appellate court failed to consider the following evidence which led the trial court to conclude the Mainlands had

the necessary intent to and, in fact, operated as a retirement community: (1) the evidence of the intent of the Mainlands over its 25 year history to be a retirement community providing housing for older persons; (2) the Association's internal operating procedures both before and after the passage of the federal law; (3) the *unrebutted* testimony of the Association's expert, Dr. Charles Longino, that the internal operating procedures of the Mainlands were consistent with a retirement community. (Tr. 728); (4) the HUD investigator's testimony that Mainlands 1 and 2 started as an adult retirement community. (Tr. 425-426); and, (5) the HUD investigator's finding that the Mainlands' intent to be housing for older persons was published by amending its By-Laws in April 1990. (D. Ex. 142; Tr. 426, 428).

The appellate court is not the trier of fact and should not re-weigh the evidence presented at trial in order to make an overall evaluation of the community's intent to be housing for older persons, not having the opportunity to see and hear the evidence first hand. An appellate court cannot pick and choose evidence from the cold record while disregarding the majority of the evidence presented to the trier of fact during a four-day trial. The appellate court has improperly reconciled and re-weighed the evidence to substitute its judgment for that of the trier of fact.

The Mainlands community clearly meets the test of demonstrating its intent to be housing for older persons through the publication and adherence to policies and procedures under the flexible interpretation of the Act identified by the United States District Court for the Middle District of Florida in *Seniors Civil Liberties Association, Inc. v. Kemp,* 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd,* 965 F.2d 1030 (11th Cir. 1992). The court in *Seniors* specifically noted that the age requirement under the Act was explicitly stated to be prospective while the rest of the Act contained no such limitation. *Id.* at 1544. The court stated that the prospective limitation was omitted because Congress presumed

that all presently existing facilities were likely to qualify, but could not presume that all current occupants met the age requirement. *Id.* at 1544. The District Court concluded, and the Eleventh Circuit agreed, that the provisions of the Fair Housing Amendments Act of 1988 did not apply retroactively to existing ownership housing. *Gilbert v. Milliken & Company,* 836 F. Supp. 856 (N.D. Ga. 1992).

The *Seniors* court also took note of Representative Synar's testimony in the legislative history that read in part, as follows:

> The gentleman from Florida addressed that [retrospective application] and he tried to make the statement that would require expenditures of money in order to qualify. The fact of the matter is if one looks at the report language of the committee we do not require specific facilities to be retrofitted in order to meet this qualification. Second, and most importantly, most of the senior citizen-type housing in this country already meets these types of restrictions and limitations.

Seniors, 761 F. Supp. at 1544; Hearings Before the Sub-Committee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 100th Congress, First Session on H.R. 1158, Fair Housing Amendments Act of 1987, 134 Cong. Rec. at H4681.

C. Intent of Congress

The court in *Seniors* cited numerous examples from the legislative history expressing Congress' intent to protect the choice of older Americans to live together in retirement-type communities. Those remarks include the following:

There are some who say that the rights of senior citizens to reside in an all senior community would be taken away if this bill is enacted. I am here today as a well known advocate for senior citizens, to say unequivocally that this will not happen. The Act fully protects the rights of senior citizens who live in retirement communities, and would allow these communities to exclude families with children if they so choose. (Remarks of Representative Pepper) *Id.* at 4606-07.

We were careful in writing the bill to make clear exceptions for "housing for older persons" — senior citizens who live in retirement communities will not be forced to live with children. (Remarks of Representative Edwards) *Id.* at H4608.

As a member of the select committee on aging and one who is deeply involved and concerned about the issues facing our older citizens in this country, I have studied this issue at great length and . . . the committee went to great lengths to make exceptions which we believe take care of the situations which would affect our elderly. (Remarks of Representative Synar) *Id.* at 4680-81.

Fair and balanced compromise that protects young families and senior citizens alike. (Remark of Senator Cranston) 134 Cong.Rec. S10557 (daily ed., Aug. 1, 1988).

Fine-tuning led to "flexibility" of exemptions.

(Remark of Senator Metzenbaum) *Id.* at S10558.

The court in *Seniors* concluded that Congress intended for the "housing for older persons" exemption to have flexible application. *Seniors*, 761 F. Supp. at 1553.

D. Age Verification Procedures

The appellate court overturned the trial court's ruling, in part, on the basis that Mainlands' age verification procedures were inadequate.

Because the Respondents stipulated that Mainlands met the 80% population requirement, the appellate court erred in challenging the manner and method Mainlands used to verify the 80% figure. Even assuming that it was proper for the appellate court to go beyond the stipulation of the parties, the appellate court still erred by re-weighing the evidence to arrive at a finding that the Mainlands' age verification procedures were inadequate to demonstrate its intent to be housing for older persons.

The appellate court erroneously overlooked the fact that neither the federal statute nor the HUD regulations contained any guidance, clarification, or definition as to what constitutes adequate age verification procedures. In fact, there were no minimal requirements espoused by the Government in any fashion for adequate age verification procedures. The District Court specifically noted that neither the statute nor the regulations provided any guidance for determining whether the Mainlands' surveys were sufficient. (Appendix C, p. 38a). In the absence of any guidance from the statute or HUD regulations, the District Court, as trier of fact, properly looked at the circumstances as a whole. After all the evidence was presented, the District Court specifically found that the Mainlands met its burden to establish the 80% population requirement with the surveys taken. (Appendix C, p. 39a).

While improperly re-weighing the evidence, the appellate court overlooked the fact that the January 1989 and December 1989 surveys were used to mathematically calculate the community's compliance with the 80% population age requirement under 42 U.S.C. § 3607(b)(2)(C)(ii), a criterion which, for purposes of appeal, the Respondents stipulated that the Association satisfied. It was factually inconsistent for the appellate court to acknowledge the community-wide surveys as being adequate to do the mathematical calculation to arrive at the 80% population requirement for the entire community, while not recognizing the individual sheets of paper in the community-wide survey to be sufficient to verify the ages identified on each survey form.

The appellate court acknowledged that the December 1990 survey adequately verified ages but ignored the pertinent facts that the December 1990 survey was consistent with the January 1989 and December 1989 surveys because the persons surveyed were the same residents surveyed twice before in 1989 and 1990.

In re-weighing the evidence and concluding that there was a lack of supporting evidence in the record of age verification procedures adequately evidencing an intent to provide housing for older persons, the appellate court overlooked the following evidence:

(a) Minutes of board meetings in November of 1988 and January 1989 concerning the new law and the survey of residents which would be conducted to determine the community's eligibility for the exemption. (D. Ex. 50, 49, 42, and 15; Tr. 216-220);

(b) Language in the January 1989 survey which stated that "this information will be used to determine the community's status in the implementation – due in March

1989 – age discrimination in housing law. Thank you for your anticipated cooperation in providing the requested data." (D. Ex. 4);

(c) Mr. Joe Toste's testimony that every block captain was familiar with the residents on their block, and that the first census was part of the Association's attempt to show that it was housing for older persons. (Tr. 363-364);

(d) The first census was started before the new law came into effect and the residents were told that the forms were needed to establish the "housing for older persons" exemption. (Tr. 365);

(e) The census was also used to keep children out of the community because the Mainlands was a retirement community. (Tr. 367);

(f) Minutes of meetings in February, March and April 1989, discussing the first census and announcing its 92% results. (D. Ex. 51, 22 and 26; Tr. 68, 220-223);

(g) Use of block captains to disseminate and collect the survey materials who had personal knowledge of the residents and their ages. (Tr. 368-382);

(h) Publication of the December 1989 census 91.5% results which also reflected the age information on the changes in occupancy within the Mainlands and established that there was not much of a turnover in occupancy in the Mainlands during 1989 and 1990. (D. Ex. 5; Tr. 56, 69, 194 and 227);

(i) A third census in December 1990 with 92.7% results. (D. Ex. 6; Tr. 64, 67);

(j) The Mainlands went through many time-consuming efforts to obtain census information for its entire population in 1989, 1990 and 1991, and also compared the voter registration records against the three censuses and did a comparison of all three censuses for accuracy. (D. Ex. 1A, 1B, 100; Tr. 70, 72-75, 129);

(k) The Association also compared the purchase dates compiled by the bookkeeper for occupants within the community. (D. Ex. 101; Tr. 76-77).

The appellate court also failed to consider the unrebutted evidence from HUD representative Cathelene Coughlin and HUD investigator Kelsey Leon's findings regarding the community and the methods used by HUD, as the enforcing agency, investigating communities, including the following:

(a) Ms. Leon found that the survey information on ages was based upon personal knowledge of the block captains, as well as asking the residents their age and social security number. (D. Ex. 143-144; Tr. 405, 413-414);

(b) Ms. Leon took the Association's word that they had over 80% in addition to the investigator visually observing the age brackets of the population using the facilities. (Tr. 415-416);

(c) According to the HUD representative, a community can qualify for the "housing for older persons" exemption by utilizing age verification procedures for the entire population, or for changes in occupancy during the transition period. (Tr. 417, 482);

(d) Further, the HUD investigator stated that if a community meets the 80% requirement, she is not going to look at the other 20%. (Tr. 454);

(e) The regulations do not specify the exact form of age verification needed to meet the 80% requirement, and HUD does *not* require a specific method of verifying ages because it is left up to the individual community. (Tr. 473);

(f) HUD representative, Cathelene Coughlin, stated that HUD was fairly flexible on what communities can provide to verify ages, and that the verification needs to be within a common sense reasonable way of verifying an age. (Tr. 476);

(g) The HUD representative conceded that in the investigations conducted by HUD, there are a variety of age verification methods that communities have successfully used. (Tr. 485-486).

The appellate court, in failing to consider the foregoing evidence, improperly re-weighed the evidence as though it were the trier of fact and, in doing so, totally ignored or overlooked the evidence set forth above. The unrebutted evidence established that at no time from January 1989 through the time of trial did the Association fall below the 80% requirement under federal law. (Tr. 71-72, 85).

The District Court's findings of fact with respect to the Association's intent to be housing for older persons are not clearly erroneous because the court's findings were based upon and drawn from ample factual evidence and testimony in the record below. There is substantial competent evidence in the record to support the court's finding of the Association's intent. Where there is substantial competent evidence to support a trier of fact's findings, those findings will not be disturbed on appeal. *LaFrance Cleaners & Dyers, Inc. v. Argenio,* 147 So. 2d 330 (Fla. 3d DCA 1962); *Lowery v. Rosenberg,* 147 So. 2d 321 (Fla. 1st DCA 1962), *cert. denied,* 153 So. 2d 306 (Fla. 1963); *In re Ingersol,* 124 B.R. 116 (M.D. Fla. 1991).

The judgment of a trial court comes to the appellate court clothed with the presumption of validity and if, upon the pleadings and evidence presented to the trial judge, sitting without a jury, there is any theory or principle of law supporting the judgment, the appellate court must affirm the trial court's decision. *Cohen v. Mohawk, Inc.*, 137 So. 2d 222 (Fla. 1962). The question of a party's intention is a question of fact to be resolved by the trier of fact. *Best Concrete Corporation v. Oswalt Engineering Service Corp.*, 188 So. 2d 587 (Fla. 2d DCA 1966).

Florida courts have consistently held that inquiries into subjective intent involve questions of fact which should be resolved by the jury or trier of fact. *See Dees v. City of Miami, supra; White v. Wainwright,* 632 F. Supp. 1140 (S.D. Fla. 1986), *aff'd,* 809 F.2d 1478 (11th Cir. 1987), *reh. denied,* 813 F.2d 411 (11th Cir. 1987); *Escrow Disbursement Insurance Agency, Inc. v. American Title and Insurance Co., Inc.*, 550 F. Supp. 1192 (S.D. Fla. 1982). Specific intent is a question of fact generally provable circumstantially and inferentially and one which the fact finder is entitled to decide based upon all of the circumstances of the case, and such findings of fact are conclusive and binding and not subject to re-examination upon appellate review unless they are clearly erroneous. *United States v. Hall,* 507 F. Supp. 242 (M.D. Fla. 1980).

Discriminatory intent is also a question of fact subject to the clearly erroneous standard of review. *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1985), *cert. denied,* 475 U.S. 1019, 106 S. Ct. 1206, 89 L. Ed. 2d 318 (1986), *citing, Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). The proper test under the clearly erroneous standard of review is whether there is evidence in the record to support the lower court's finding and whether the lower court's construction of that evidence is a reasonable one. A finding is only clearly erroneous when the reviewing court on the entire evidence is left

with a definite and firm conviction that a mistake has been committed. The question is not whether the finding is the best or only conclusion to be made from the evidence, or whether it is the one which the reviewing court would make. *Id.* at 140.

Likewise, a lower court's finding of no discriminatory intent shall not be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial court to consider all the evidence and judge the credibility of the witnesses. *Vaughner v. General Accident Insurance Company of America,* 804 F.2d 873 (5th Cir. 1987). The defendant Association presented competent, substantial documentary evidence and testimony to prove that it had the intent to provide housing for older persons on the dates of the alleged acts of discrimination. The plaintiffs presented no evidence to refute the Association's substantial competent evidence concerning its intent to provide housing for older persons. Neither the statute nor the regulations impose a mandatory requirement upon a community to demonstrate its intent to be housing for older persons in any particular fashion.

The District Court correctly concluded that the evidence in the record as a whole established the Association's intent to be housing for older persons.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING THE PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC DATED FEBRUARY 1, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4635

JOSEPH W. MASSARO,
PATRICIA ANN MASSARO,

Plaintiffs-Counterclaim-
Defendants-Appellants,

JOSEPH P. MASSARO,

Plaintiff-Counterclaim-
Defendant,

versus

MAINLANDS SECTION 1 & 2 CIVIC ASSOCIATION, INC.,

Defendant-Counterclaim-
Plaintiff-Appellee.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

Appendix A

MAINLANDS SECTION 1 & 2 CIVIC ASSOCIATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and COX, Circuit Judges, and HOBBS*, Senior District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/ Phyllis Krairtek
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

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* Honorable Truman M. Hobbs, Senior U.S. District Judge for the Middle District of Alabama, sitting by designation.

APPENDIX B — THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT REPORTED AT 3 F.3D 1472 DATED OCTOBER 7, 1993

Joseph W. MASSARO, Patricia Ann Massaro, Plaintiffs-Counterclaim Defendants-Appellants,

Joseph P. Massaro, Plaintiff-Counterclaim Defendant,

v.

MAINLANDS SECTION 1 & 2 CIVIC ASSOCIATION, INC., Defendant-Counterclaim Plaintiff-Appellee.

UNITED STATES of America, Plaintiff-Appellant,

v.

MAINLANDS SECTION 1 & 2 CIVIC ASSOCIATION, INC., Defendant-Appellee.

No. 92-4635.

United States Court of Appeals, Eleventh Circuit.

Oct. 7, 1993.

Michael R. Masinter, Ft. Lauderdale, FL, Alan G. Ehrlich, Jacaranda Lakes, FL, Gregory B. Friel, Dennis J. Dimsey, U.S. Dept. of Justice, Civil Rights Div., Washington, DC, for appellants.

Kathleen M. Burgener, Alan S. Becker, Becker & Poliakoff, P.A., Ft. Lauderdale, FL, for appellee.

Appendix B

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and COX, Circuit Judges and HOBBS*, Senior District Judge.

KRAVITCH, Circuit Judge:

Joint appellants, the United States and the Massaros, filed a complaint against the Mainlands Civic Association (Association) alleging that the Association had discriminated against families with children in violation of the Fair Housing Act Amendments of 1988 by attempting to evict two families with infants. Appellees raise the affirmative defense that the Mainlands community is housing for older persons and thus, qualifies for an exemption under the Act. After a bench trial, the district court found that the Association met all three of the statutory requirements for the exemption, 796 F.Supp. 1499. On appeal, the parties have narrowed the issue to one prong of the three-part statutory test of the Fair Housing Act: whether the Mainlands Civic Association has proved "the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older." 42 U.S.C. § 3607(b)(2)(C)(iii).[1] The interpretation of this provision presents an issue of first impression in this circuit.

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* Honorable Truman M. Hobbs, Senior U.S. District Judge for the Middle District of Alabama, sitting by designation.

1. For purposes of appeal, appellants have stipulated that the Association satisfies the other two criteria for the exemption by providing significant facilities and services for seniors and meeting the population age requirement. See 42 U.S.C. § 3607(b)(2)(C)(i) and (ii).

Appendix B

I.

The Mainlands Section One and Two is a residential community consisting of 529 single-family houses located in Tamarac, Florida. Each home in the Mainlands is owned individually in fee simple, subject to a declaration of restrictions. The declaration of restrictions provides for the formation of the Mainlands Civic Association, a non-profit corporation expressly charged with enforcing the declaration. The declaration also specifies use limitations on the properties, including the age restriction at issue in this appeal, which states that "the use of all the lots in the aforedescribed lands is hereby limited to permanent residents sixteen (16) years of age or older."[2] This provision is the sole age requirement in the declaration. The declaration provides that it cannot be amended before July 1991. Thereafter, the vote of a majority of the homeowners in the subdivision is required for any change in its covenants and restrictions.

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2. Declaration of Restrictions, R1-1, Ex. A at 5. The preceding text states that

> In recognition of the fact that the subdivisions of THE MAINLANDS OF TAMARAC LAKES and THE MAINLANDS OF TAMARAC LAKE, SECOND SECTION, have been platted, and the structures to be located therein designed primarily for the comfort, convenience and accommodation of adult persons and in further recognition that the lands and lots comprising same were marketed as an "adults only" neighborhood, the use of all the lots in the aforedescribed lands is hereby limited to permanent residents sixteen (16) years of age or older. . . .

Id.

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On September 26, 1989, the Mainlands Civic Association exercised its authority under the declaration and sent a letter to Joseph and Patricia Massaro advising them that the presence of their infant son in their home violated the declaration of restrictions and warning that litigation would ensue if the Massaros refused to remove the child. The Massaros responded by filing a complaint against the Association in federal district court and filing an administrative complaint with the Department of Housing and Urban Development (HUD) alleging that the Association's actions violated the Fair Housing Act's prohibition on discrimination against families with children. The Act provides for judicial and administrative enforcement procedures which may occur simultaneously. 42 U.S.C. § 3604.

Months later, in April of 1990 the Association voted to amend its bylaws to restrict occupancy of the houses in the subdivision to persons 55 years old or over.[3] The Association reserved the right to grant hardship exemptions allowing residents below the age of 55, provided that at least 80% of the lots had one resident 55 years of age or older. The Articles of Incorporation for the Association provides that the bylaws can be amended by "a two-thirds vote of the membership" and membership is open to any homeowner in the Mainlands Section One and Two. The meeting of the Association to amend the bylaws was attended by 166 homeowners and the amendment passed by a vote of 159 in favor of the amendment and 6 against it, with one person abstaining. The meeting also passed a resolution to establish screening procedures to enforce the new amendment.

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3. The amendment provides in pertinent part that "[n]o lot shall, at any time, be permanently occupied by children who are under eighteen (18) years of age. . . . No permanent occupancy of any lot shall be permitted by an individual between the ages of eighteen (18) and fifty-five (55)."

Appendix B

On September 7, 1990, Carrie and Gary Mirabile received a letter from the Association notifying them that the presence of their infant daughter in their home was a violation of the age prohibition in the declaration of restriction because she was under the age of sixteen. The Mirabiles also filed a complaint with HUD.

As a result of the complaints of the Massaros and the Mirabiles, HUD sent an investigator to the Mainlands. HUD's regional counsel subsequently determined that there was reasonable cause to believe that bias had occurred and issued a charge of discrimination. The agency made several findings to support its conclusions. The report stated that "[p]rior to April 13, 1990, the Association had not published policies and procedures demonstrating an intent to make Mainlands 'housing for persons 55 years of age or older.' "[4] Moreover, the agency found that the Association had failed to adhere to the policies stated in the amendment to the bylaws and that the Association maintained inadequate procedures to verify the ages of persons owning homes in the subdivision. HUD concluded that the Association failed to meet its burden of demonstrating that it qualifies for the exemption; accordingly, its actions against the Massaros and Mirabiles constituted discrimination on the basis of familial status.

After HUD issued a final determination, the case was referred to the Justice Department, which filed a complaint in federal district court on behalf of the United States. The district court consolidated the Massaros' and the United States's cases and conducted a bench trial. Contrary to HUD, the district court found that the Association met the requirements of the statute, thus qualifying for the exemption and defeating the discrimination charge. The Massaros and the United States appeal this decision.

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4. Determination of Reasonable Cause and Charge of Discrimination, R4-143 at 5.

Appendix B

A district court's findings of fact are reviewed under a clearly erroneous standard. Fed.R.Civ.P. 52(a). The application of the law to the facts, however, is subject to de novo review. *See Universal Underwriters Ins. Co. v. Stokes Chevrolet, Inc.*, 990 F.2d 598, 601 (11th Cir.1993). Furthermore, under the law of this circuit, the Association carries the burden of proving its eligibility for the exemption. *Rogers v. Windmill Pointe Village Club Ass'n, Inc.*, 967 F.2d 525, 527 (11th Cir.1992). Exemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of preventing housing discrimination. *Elliott v. City of Athens*, 960 F.2d 975, 979 (11th Cir.1992).

II.

Congress amended the Fair Housing Act in 1988 to include a prohibition against housing discrimination based on familial status. 42 U.S.C. § 3604. The Act defines the term "familial status" as "one or more individuals (who have not attained the age of 18 years)" living with a parent or legal guardian. 42 U.S.C. § 3602(k). Members of Congress determined the need for such legislation based on studies and hearings indicating that families with children were having difficulty securing housing because of age limitations. *See* 134 Cong.Rec. S10547 (daily ed. Aug. 2, 1988) (statement of Sen. Hatch); *see also Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1035 (11th Cir.1992).[5]

Some members, however, expressed misgivings regarding the

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5. In *Seniors*, this court upheld the statutory provisions against numerous challenges, including charges that the statute violates the First Amendment's guarantee of freedom of association; violates the Fifth Amendment by depriving persons of their liberty and property interest; deprives persons of their right to privacy; violates the Tenth Amendment by encroaching on state's rights; and is (Cont'd)

impact of the amendments on retirement communities, where elderly residents had bought or rented homes with the expectation that they would be able to live without the noise and hazards of children. *See* 134 Cong.Rec. H6499 (daily ed. Aug. 8, 1988) (statement of Rep. Fish). To address these concerns, the Act exempts "housing for older persons" from the familial status provisions in the Act. Older persons' housing is defined as that "intended for occupancy by at least one person 55 years of age or older per unit." 42 U.S.C. § 3607(b)(2)(C). Congress gave the Department of Housing and Urban Development the authority to determine whether housing qualifies for the exemption. The Act further provides that,

> the Secretary [of HUD] shall develop regulations which require at least the following factors:
>
> (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons. . . .
>
> (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
>
> (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide

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(Cont'd)

unconstitutionally vague. 965 F.2d at 1033. This court found each of these claims meritless and noted the "strong deference accorded to legislation in the field of national economic policy." *Id.* at 1035.

housing for persons 55 years of age or older.

Id.

In accordance with the statute, the Secretary of HUD promulgated regulations providing for the minimal requirements listed in the Act and further clarifying them. The pertinent regulations for this case explicate the third part of the statutory test requiring the publication of, and adherence to procedures and policies indicating an intent to provide housing for older persons. According to 24 C.F.R. § 100.304(c)(2), there are six non-exclusive factors which are relevant to a determination under this part of the test:

> (i) The manner in which the housing facility is described to prospective residents.
>
> (ii) The nature of any advertising designed to attract prospective residents.
>
> (iii) Age verification procedures.
>
> (iv) Lease provisions.
>
> (v) Written rules and regulations.
>
> (vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations.

Id. These six determinants, along with the statute, are the primary criteria guiding HUD and the courts in their assessment of whether a defendant has violated the Fair Housing Act. *See Park Place*

Appendix B

Home Brokers v. P-K Mobile Home Park, 773 F.Supp. 46, 48-51 (N.D.Ohio 1991) (analyzing statute and regulations to determine whether mobile-home park had significant facilities and services for older persons).[6]

III.

Before analyzing the six regulatory factors, the district court noted a preliminary concern as to whether the Association was an organizational entity which could claim the exemption. Both the statutory and regulatory language of the exemption focus on the actions and intent of the owner or manager of the housing complex.[7] The Mainlands subdivision, however, does not have a centralized owner or manager. The record in this case establishes that the Mainlands Civic Association does not own any of the homes in the subdivision, nor does it lease or rent the dwellings. It participates in no aspect of the selling, buying, renting or leasing process for any of the houses. Furthermore, the Association produces no advertising material to publicize vacancies or attract future residents.

Although the Association is not an owner or manager, we agree with the district court that it is eligible for the exemption. First, the Association performs the functions of an owner and

6. Fair housing discrimination cases are subject to the three-part test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir.1990). In the instant case, however, the government produced direct evidence of discrimination, negating the need to use the *McDonnell Douglas* test. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985). Accordingly, we proceed to consider the merits of the Association's affirmative defense.

7. District Court Order of June 5, 1992 at 7.

manager in several critical ways relevant to the purpose of the Fair Housing Act. The Association has the power to enforce the declaration of restrictions and thus, to exclude persons from occupancy in the homes. The Association also regulates the use of the homes through its bylaws and by amending the declaration of restrictions. Whenever possible, courts construe statutory language to be true to the meaning of the legislation. As Judge Learned Hand stated, statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co. v. Yensavage,* 218 F. 547, 553 (2nd Cir.1914), *cert. denied,* 235 U.S. 705, 35 S.Ct. 282, 59 L.Ed.434 (1915), *quoted in Connecticut Nat. Bank v. Germain,* __ U.S. __, __ n. 1, 112 S.Ct. 1146, 1150 n. 1, 117 L.Ed.2d 391 (1992) (Stevens, J., concurring). In this case, the Association acts as an owner in performing functions which are relevant to the goals of the Act.

Second, Congress intended to rid the entire housing market of discrimination and homeowners' associations are not expressly omitted from the reach of the Act. Congress did create a limited exemption for "any single-family house sold or rented by an owner." 42 U.S.C. § 3603. The exemption is crafted narrowly and the owner is prohibited from using any rental services of a broker or agent, or advertising, posting or publicizing an intent to discriminate. In the instant case, the single-family homeowners chose to buy homes covered by a declaration of restrictions which created an Association empowered with enforcement of the declaration. The declaration and the Association's powers distinguish the case from that of a single family homeowner and place the Association within the reach of the Act. Moreover, the record shows that the Association conducted a mailing to notify real estate brokers that the subdivision claims an exemption from the Act and excludes children. Thus, the Association has

performed functions of an owner and manager and is not expressly exempt from the Act's provisions.

Finally, this circuit previously has considered a homeowner association's eligibility for the older persons' exemption to the Fair Housing Act. *Rogers*, 967 F.2d 525. Although the court did not expressly find that such an entity was eligible for the exemption, the court considered whether the association's actions met the statutory and regulatory requirements. Thus, the actions of this type of an organization can be subject to judicial scrutiny under the Act. Accordingly, we analyze the Association's actions as they relate to the policies-and-procedures prong of the statutory test for an exemption.

IV.

The district court found that several of the six factors listed in the regulations are inapplicable to the instant situation because of the Association's particular function in the community. For example, the court concluded that the requirements concerning the manner in which the housing is described and advertised are inapplicable to the instant case because the Association bears no responsibility for attracting future residents. The court also noted the limited application of the fourth requirement pertaining to lease provisions because the community predominantly consists of family-owned homes. We agree with the district court's decision to disregard these three criteria because they have limited use given the specific facts of this case.

A.

The district court made findings as to the factor regarding age-verification procedures and determined that the Association met its

burden with regard to this criterion.[8] The court decided that the actions of the Association's board and its welcoming committee satisfied the requirement. We conclude that the court erred as a matter of law, however, in failing to consider the status of these procedures at the time of the discriminatory acts against the Massaros and the Mirabiles and overlooking pertinent evidence concerning the Board and welcoming committee.

According to the evidence presented at trial, the Association conducted three surveys of its residents, two of which occurred prior to the actions against the Massaros and Mirabiles. The first survey was distributed in January of 1989 and asked the respondent to indicate how many occupants were over 62 years of age and how many were over 55. A second census was distributed in December of 1989 and also requested information on the age of the occupants of Mainlands. Neither survey, however, required any independent verification of the ages of the occupants.[9] The language of the regulation indicates that the surveyor must verify the age of residents. Moreover, verify is commonly defined as

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8. The district court cautioned that this factor has limited relevance because the statute and regulations are written to address a situation with a single owner or manager who easily can enact such procedures. We agree with the district court and conduct a limited review of these procedures cognizant of the Association's organizational limitations.

9. Ms. Goulart, the former secretary of the Association, testified that the second survey in December of 1989 asked for a drivers' license number. Tr. at 123. There was no further testimony that respondents gave their number or that the number was ever used to verify ages. Mr. Semenik, a member of the Association's Board, testified that the survey requested social security numbers because the Board believed that it could obtain age information from this number. Tr. at 643. It was noted, however, that social security cards do not contain any indication of age or date of birth. Mr. Conn, president of the Association, testified that this survey did not contain any age verification. Tr. at 249.

providing proof.[10] Several HUD administrative decisions indicate that copies of drivers' licenses or birth certificates are acceptable ways to verify ages of residents. *See HUD v. Murphy,* Fair Hous.—Fair Lend. Rep. (PH) ¶ 25,017, 25050 (HUD ALJ 1990); *HUD v. TEMS Association, Inc.,* Fair Hous.—Fair Lend. Rep. (PH) ¶ 25,028 (HUD ALJ 1992). In addition, the person responsible for gathering the second survey testified that he told residents that the survey was being taken so that the Association could prevent children from living in the community. This suggests that the age verification procedure was aimed more at excluding children than at including older persons.[11]

A third survey was conducted from December of 1990 through April of 1991. Although the persons conducting this census did obtain adequate age verification, on the facts of this case its import is minimized because it took place after the alleged discriminatory actions.

The district court found that the welcoming committee contributed to age verification. The committee, however, only met with new owners or occupants after they had moved into the complex.[12] The welcoming committee had no means of enforcing the age restriction and could not require that persons meet with them. Moreover, the welcoming committee did not distribute census forms to verify ages of residents until 1991, after the alleged discriminatory acts.[13] Thus, we conclude that the

10. Verify means "to confirm or substantiate by oath or proof." *Webster's Third New International Dictionary* 2543 (3d ed. 1986).

11. Tr. at 365, 367.

12. Tr. at 397.

13. Tr. at 398.

Association had not instituted age-verification procedures adequately evidencing an intent to provide housing for persons 55 years of age or older prior to taking action against the Massaros and the Mirabiles. In holding to the contrary, the district court erred.[14]

B.

The fifth factor for determining whether there was an intent to provide housing for older persons is the existence of written rules and regulations. The district court determined, and we agree, that this factor is relevant to the instant case. Indeed, this factor was the subject of heated dispute throughout the litigation. The district court decided that the community met this requirement because it passed a valid bylaw amendment limiting residency to persons over age 55. It was established, however, that the only written rule that existed prior to the action against the Massaros was the prohibition in the declaration of restrictions on occupancy by children.[15] The bylaw amendment was not enacted until April 1990, months after the Massaros received their letter from the Association. The district court erred in failing first to consider whether the Association met its burden with respect to the Massaros before analyzing the bylaw, which only applies to the Mirabiles' situation.

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14. We hold that the district court erred as a matter of law in failing to distinguish between actions that occurred before the alleged discriminatory acts and those that took place later. In addition, the court erred in failing to consider pertinent facts. After considering these critical facts as well as the timing of the Association's actions, we conclude that there is insufficient evidence to establish the Association's eligibility for the exemption with respect to the age verification procedures at the time that letters were sent to the Massaros and Mirabiles.

15. Tr. at 246.

Appendix B

The declaration's restriction on residency by children cannot show that the community intended its housing to be for older persons because then any policy against families would suffice for the exemption, swallowing the rule against such discrimination. Moreover, this court previously has held that a condominium complex failed to adhere to policies and procedures when the complex only had a prohibition in the declaration against children under 16 years of age. *Seniors,* 965 F.2d at 1033.[16]

In holding that the declaration's rule against residency by those under 16 years of age is not a sufficient basis for the exemption, we are not contradicting legislative history which suggests that Congress did not intend to deny communities the exemption because they had preexisting restrictions which were lower than the 55-year minimum. When the Fair Housing Act Amendments were discussed before the Senate, Senator DeConcini asked Senator Kennedy as sponsor of the bill, whether a community with a preexisting restriction lower than the age in the Act could qualify for the exemption assuming that the community currently meets the criteria for an exemption and that the preexisting restrictions are not applied in a manner that conflicts with the Act. Senator Kennedy responded that the community could qualify for the exemption "contingent upon the community meeting the exemption requirements and not enforcing any pre-existing restriction in a manner inconsistent with the act." 134 Cong. Rec. S 10549 (daily ed. Aug. 2, 1988). In the instant case, most of the criteria which could otherwise qualify the community are inapplicable. Moreover, the applicable criteria, including age verification, are not adequate and the community is only enforcing its restrictions to exclude children in a manner inconsistent with

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16. The facts upon which the appellate court based its decision are recounted in the district court's opinion, *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 761 F.Supp. 1528, 1535 (M.D.Fla.1991).

the Act. Thus, our holding in this case is limited to these facts and is not inconsistent with the legislative intent expressed by Senators Kennedy and DeConcini.

The Association contends that the declaration of restrictions prohibited any amendments before 1991 and that a Broward County ordinance banned discrimination against those under 55 years of age until the ordinance was repealed in March of 1990. Thus, the Association could not enact other rules or regulations concerning age restrictions to demonstrate its intent to provide housing for older persons. The fact that the development's self-imposed rule and local ordinances render it more difficult for the Association to qualify for the exemption, however, does not mitigate its burden under the Act. As previously noted, the Association bears the burden of establishing its eligibility and the exemptions are to be narrowly construed to enforce the goals of the Act. *See Rogers*, 967 F.2d at 527; *Elliott*, 960 F.2d at 979. In addition, HUD has stated that the Fair Housing Act does not preempt state or local laws that are not discriminatory even if the state or local law renders it more difficult or even impossible to qualify for an exemption under the Act.[17]

After the county ordinance was lifted, the Association passed a bylaw amendment that increased the age restriction from sixteen

17. HUD noted that many of the California mobile parks have complained that they are unable to qualify for an exemption for older persons' housing because state law requires that a homeowner be notified six months prior to amendments to rules and regulations governing the park. The state law makes it difficult and in some cases impossible to qualify for the exemption under the transition provision of the Act, which allows a community to qualify even if previous occupants do not meet the age requirement of the Act as long as new residents are over the age limit. Senators Kennedy and Specter and Representative Edwards also expressed the opinion that Congress did not intend to preempt local laws. 24 C.F.R. Ch. 1, Subch. A, App. I at 902.

to fifty-five years of age, the age limit of the Fair Housing Act. This bylaw was passed after the Massaros received their letter, but before the Assocation took action against the Mirabiles, so it is applicable only to the Mirabiles' case. The United States contends that the bylaw is invalid and unenforceable.

The district court found that the bylaw was validly enacted. The court erred as a matter of law, however, in concluding that this finding is sufficient or necessary to establish an intent to provide housing for older persons. We hold that the rule itself is insufficient to qualify the community for the exemption because the regulations contemplate balancing various factors and thus, the rule must be weighed in the overall evaluation of the community's intent that the housing be for older persons.

Moreover, it is unnecessary to decide the state law issue concerning the bylaw's validity because the federal statute and regulations are more concerned with the intent of the community. The district court correctly noted that HUD's regulations "take their cue from the statute, and discuss the relevant factors in terms of the owner or manager's compliance with the published policies and procedures."[18] We give deference to an agency's construction of the statute and hence, look to the Association's procedures and actions taken in response to the bylaw age restriction. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (deferring to an agency's interpretation of the statute if it is based on a permissible construction and is reasonable).

The bylaw amendment states in pertinent part that

> [n]o permanent occupancy of any lot shall be

18. District Court Order of June 5, 1992 at 7.

> permitted by an individual between the ages of eighteen (18) and fifty-five (55). Notwithstanding same, the Board in its sole discretion shall have the right to establish hardship exceptions to permit individuals between the ages of eighteen (18) and fifty-five (55) to permanently reside in the community, providing that said exceptions shall not be permitted in situations where the granting of a hardship exception would result in less than 80% of the lots in the community having less than one resident fifty-five (55) years of age or older. . . .[19]

The bylaws further provide that the Board shall develop procedures to carry out the purpose of this bylaw. The district court found that the Board had sent letters to realtors stating that the Mainlands Sections One and Two was housing for older persons and that the Board instituted screening procedures through its welcoming committee. The court erred again in considering the Association's acts after the date of the discriminatory practices and in overlooking pertinent facts.[20]

A member of the Board testified that there was no screening committee per se until after September 7, 1990, the date of the eviction letter to the Mirabiles.[21] The screening procedure was

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19. R1-20 at 8.

20. After considering the timing of events and additional pertinent facts, we conclude that insufficient evidence exists to constitute an adherence to and enforcement of the bylaw amendment.

21. Tr. at 652.

further flawed because some realtors refused to abide by the Assocation's request concerning these procedures.[22] The realtors were not convinced that the community qualified for the exemption because the deed of restrictions had not been amended and thus, they did not feel bound by the age limitation.[23]

Furthermore, most of the persons were "screened" after they had become a homeowner in the community; others moved in without coming to the attention of the committee.[24] None of the new residents under the age limit requested a hardship exemption from the Board.[25] Although some persons under 55 submitted applications and had interviews, the committee did not issue hardship exemptions as required by the bylaws nor did it take any measures to evict persons under 55.[26] The only persons who were asked to leave the community were those with children.[27] *See TEMS,* Fair Hous.— Fair Lend. Rep. (PH) ¶ 25,028 (fact that housing association selectively allowed under-55-year-olds to

22. Mr. Conn, president of the Association, testified that "[t]he real estate people didn't bring that many people to be screened. They had a field day." Tr. at 258.

23. Tr. at 259.

24. Tr. at 640.

25. Tr. at 134.

26. *Id.*

27. These persons included the Mirables and Massaros and Ms. Gina Marsey, a renter with children. Ms. Marsey was visited by Mr. Conn, the Assocation president, and told about the declaration of restrictions prohibiting children. She moved shortly after her discussion with Mr. Conn. This interview took place after the Massaros had filed their complaint with HUD in April of 1990, but Mr. Conn did not remember if the amendment to the bylaws was in effect at the time. Tr. at 256.

inhabit homes as long as they did not have children indicated that the community did not have adequate policies and procedures to qualify for exemption). In addition, rules concerning fees for approval applications appeared to be waived without any process or reason.[28] It appears from these facts that the Board failed to develop a credible process for enforcing the bylaws and accordingly, new residents and realtors did not adhere to the policy.

Most important, the secretary of the Association, Ms. Goulart, acknowledged that she did not believe that the bylaw amendment was enforceable. When plaintiff's counsel stated that the Association had done nothing to stop adults under age 55 from moving into the Mainlands, Ms. Goulart replied, "How could we stop them?"[29] Moreover, she acknowledged that the Association has a rule providing that it could exclude persons under 55, but she believed that the Association could not actually exclude such persons. Ms. Goulart then distinguished between the bylaws, which she considered unenforceable, and the declaration of restrictions, which could be enforced.[30] Mr. Semenik, a member of the Board of the Association, also agreed that the Association could take no action to prevent persons under age 55 from moving into the community.[31]

The Association argues that it is not required to take any action against persons under 55 years of age until the community is in danger of dropping below 80%, the percentage of homes which

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28. Tr. at 142-43.

29. Tr. at 138.

30. Tr. at 140.

31. Tr. at 640.

must be occupied by at least one person over 55 years of age to qualify for the exemption. The statute, however, requires that the Association demonstrate an intent to provide housing for older persons; the regulations then list six factors that can be used to establish this requisite purpose. Because so many of these factors were inapplicable to the Association and its only other rule was the prohibition against children, the amended bylaw was the Association's evidence of intent.[32] The Association, however, cannot rely exclusively on the existence of the rule because the regulations contemplate balancing the various criteria and we must weigh the sixth factor—the enforcement of and adherence to the policy. We conclude that the Association's lack of procedures shows a failure to adhere to the amendment.[33] In addition, the Association's secretary and a member of the Board testified that they did not believe that the bylaw was enforceable and thus, they did not enforce it. Therefore, the Association has failed to satisfy the criteria of the regulations and cannot meet the "policies and procedures" prong of the statutory test for the exemption.[34]

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32. Mr. Conn, the president of the Association, testified that the Association had no policies and procedures in place to qualify for the exemption until the bylaw amendment was enacted in April 1990. Tr. at 325.

33. The Association repeatedly asserted that it was not attempting to enforce the bylaws against the Massaros and the Mirabiles. Because the Association was not acting on the basis of the bylaw amendment, we do not reach the issue of the legality of such an enforcement action. We look to the Association's adherence and enforcement procedures with respect to the bylaws only to establish the intent of the Association.

34. Whether the ultimate issue in this case is a question of fact or a mixed question of law and fact presents a difficult problem. We need not resolve this issue, however, because even assuming the more deferential standard of review, we hold that given the lack of supporting evidence at the time of the discriminatory acts, the district court clearly erred in its conclusion that the Association established sufficient policies and procedures to prove an intent to provide housing for older persons.

Appendix B

V.

We hold that the Association did not qualify for the older-persons exemption at the time of its actions against the Massaros and Mirabiles.[35] The district court's order is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

35. We express no opinion on the validity or enforceability of the current bylaw, nor do we hold that the Association is permanently enjoined from enforcing its declaration of restrictions, because different facts would require a new balancing test.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA REPORTED AT 796 F. SUPP. 1499 DATED JUNE 8, 1992

Joseph W. MASSARO and Patricia Ann Massaro, etc., Plaintiffs,

v.

MAINLANDS SECTION 1 AND 2 CIVIC ASSOCIATION, INC., Defendant.

UNITED STATES of America, Plaintiff,

v.

MAINLANDS SECTION 1 AND 2 CIVIC ASSOCIATION, INC., Defendant.

Nos. 90-6297-CIV, 91-6625-CIV.

United States District Court,
S.D. Florida.

June 8, 1992.

Kathleen Marie Burgener, Alan Steven Becker, Becker, Poliakoff & Streitfeld, P.A., Fort Lauderdale, Fla., for Mainlands Section 1 & 2 Civic Ass'n, Inc.

Michael R. Masinter, Nova University Center for the Study of Law, Fort Lauderdale, Fla., Alan G. Ehrlich, Jacaranda Lakes, Fla., for Joseph W. Massaro and Patricia Ann Massaro.

Barbara Kammerman, Housing and Civ. Enforcement

Appendix C

Section, Civ. Rights Div., U.S. Dept. of Justice, Washington, D.C., for U.S.

MEMORANDUM OPINION

RYSKAMP, District Judge.

These cases were brought by the plaintiffs to enforce the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq. They were consolidated, and a non-jury trial was held from April 27 to April 30, 1992. Judgment having been rendered at the conclusion of the trial for the defendant in each case, the court now issues the following Memorandum Opinion.

Background

The Mainlands Section One and Two is a residential subdivision of 529 homes located in Tamarac, Florida. Each home is subject to a declaration of restrictions. Article 4 of the amended declaration of restrictions bars children under 16 years of age from residing in any home in the community.

The plaintiff Massaros live in the Mainlands. They had a child on July 11, 1989. On September 26, 1989 the Mainlands Association, the community's governing body, sent a letter to the Massaros seeking to enforce Article 4 of the deed. The Massaros then filed a complaint against the Association in this court, and with the Department of Housing and Urban Development (hereinafter "HUD"), under the Fair Housing Amendments Act of 1988.[1] Thereafter, on April 13, 1990, the Association enacted an

1. The Fair Housing Amendments Act of 1988, which prohibits discrimination in the sale or rental of housing in part on the basis of "familial status", took effect on

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amendment to their bylaws restricting occupancy in the subdivision to persons 55 years of age or older.[2]

The Mirabiles also live in the Mainlands. After their child was born, the defendant sent a letter to them dated September 7, 1990, seeking to enforce Article 4 of the amended declaration of restrictions. The Mirabiles then filed a complaint with HUD. Pursuant to HUD's finding that it had reasonable cause to believe that the defendant had violated the Fair Housing Amendments Act of 1988, and pursuant to the parties' election to have this case heard in federal court, HUD filed suit against the defendant, and the court then consolidated the cases.

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March 13, 1989. See 42 U.S.C. § 3604. It provides for two methods of enforcement. A private party plaintiff may file suit in federal court. 42 U.S.C. § 3613(a)(1)A). The plaintiff may also file a complaint with the Department of Housing and Urban Development. 42 U.S.C. § 3610(a)(1)(A)(i). The plaintiff Massaros elected to proceed under both methods. If HUD finds reasonable cause to believe that the defendant has violated the Fair Housing Act, it files a charge of discrimination. 42 U.S.C. § 3610(g)(2)(A)). In this case, the Secretary found reasonable cause, and, after the parties elected to have their dispute decided in federal court pursuant to 42 U.S.C. § 3612(o), the United States filed suit on behalf of the Massaros in this court.

2. That provision states in pertinent part, "Inasmuch as the Mainlands Section 1 & 2 Civic Association, Inc. is designed and intended as a retirement community for older persons, to provide housing for residents who are fifty-five (55) years of age or older . . . [n]o permanent occupancy of any lot shall be permitted by an individual [less than] fifty-five (55). Notwithstanding same, the Board in its sole discretion shall have the right to establish hardship exceptions . . . providing that said exceptions shall not be permitted in situations where the granting of a hardship exception would result in less than 80% of the lots in the community having less than one resident fifty-five (55) years of age or older . . . ."

Appendix C

Legal Issue

In 1988 Congress passed the Fair Housing Amendments Act. That law wrought major changes to the Fair Housing Act of 1968 (hereinafter "Title VIII"). Among those changes was Congress' decision to include families with children within the scope of Title VIII. The practical effect of that amendment was to make it illegal for housing providers to discriminate against families with children.

However, the amendment also created a narrow exception to that proscription. Section 3607(b) of Title 42 provides that "housing for older persons" shall be excluded from that part of Title VIII which makes discrimination against families with children illegal. That statute also defines housing for older persons. It provides that housing for older persons is: (A) a State or Federal housing program that is determined by the Secretary of Health and Human Services to be specifically designed and operated to assist elderly persons; (B) housing that is intended for, and solely occupied by, persons 62 years of age or older; or (C) housing that is intended and operated for occupancy by at least one person 55 years of age or older per unit.

The defendant, Mainlands Association, argues that it qualifies as housing for older persons because the Mainlands is intended and operated for occupancy by at least one person 55 years of age or older per unit. The plaintiffs disagree. A factual determination that the Mainlands qualifies, or does not qualify, under 42 U.S.C. § 3607(b(2)(C)) as housing for older persons, will therefore be determinative of this case.

The "55 or Older" Exemption

Congress provided further interpretive guidance when it

defined housing that is intended and operated for occupancy by at least one person 55 years of age or older per unit. Specifically, it created three de minimus requirements for a development to satisfy the 55 or older test. First, the housing facility must have significant facilities and services that are specifically designed to meet the physical or social needs of older persons. Second, at least 80 percent of the units must be occupied by at least one person 55 years of age or older per unit. Third, the housing facility must publish policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. See 42 U.S.C. § 3607(b(2)(C)).

Congress also directed the Secretary of Housing and Urban Development to develop regulations. Id. In compliance, the Secretary has promulgated regulations that list qualifying examples of significant facilities and services and policies and procedures that demonstrate an intent to provide housing for older persons. See 24 C.F.R. § 100.304 (1990).

Section 100.304(b(1)) provides that, [s]ignificant facilities and services specifically designed to meet the physical or social needs of older persons' include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them. 24 C.F.R. § 100.304(b(1)).[3]

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3. The regulations also provide that a facility that does not have significant facilities and services can still qualify for the housing for older persons exemption by meeting the other two prongs, by demonstrating that it is not practicable to provide

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That regulation is careful to note that the housing community need not have all of the features mentioned to qualify under that prong. See 24 C.F.R. § 100.304(b)(2). See also Seniors Civil Liberties Association v. Kemp, 761 F.Supp. 1528 (M.D.Fla.1991) (extent of significant facilities and services may vary with size of complex and selling price of units, and as a practical matter is tied to age of residents). Moreover, HUD stressed that "[a] housing facility may have significant facilities and services designed to meet the physical or social needs of older persons and still provide housing for active older persons who live very independently." 24 C.F.R. Ch. 1, Subch. A., App. 1 686, 719 (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988) (1990) (emphasis in original). HUD also noted that not only could facilities and services on the list qualify if they are associated with active older persons, but that the types of qualifying services and facilities could vary by geographic location and by the needs of the residents. Id.

Also, the regulations establish six non-exhaustive factors which are relevant for determining whether the housing facility has published and adhered to policies and procedures which demonstrate an intent to provide housing for persons 55 years of age or older. These include: (i) the manner in which the housing facility is described to prospective residents, (ii) the nature of any advertising designed to attract prospective residents, (iii) age verification procedures (iv) lease provisions, (v) written rules and

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significant facilities and services, and by demonstrating that the development is necessary to provide important housing opportunities for older persons. 24 C.F.R. § 100.304(b)(2). However, neither party has asserted that this default provision should apply to this case. Also because the court finds, infra that the Mainlands meets the significant facilities and services prong of the housing for older persons test, it need not discuss this issue further.

regulations, and (vi) actual practices to enforce relevant lease provisions and relevant rules or regulations. 24 C.F.R. § 100.304(c)(2).

There is, however, an anomaly in both the statute and the regulations. In creating the "policies and procedures" prong of the 55 and over exemption, Congress determined that it is the owner or manager's intent that is relevant for establishing whether the development in question seeks to provide housing for older persons. See 42 U.S.C. § 3607(b)(2)(C)(iii). The regulations, in turn, take their cue from the statute, and discuss the relevant factors in terms of the owner or manager's compliance with the published policies and procedures. See 24 C.F.R. 100.304(c)(2).

In the case at bar, however, there is no centralized owner or manager to speak of. Rather, the Mainlands is a community of freestanding single family homes that was completed in 1964. The closest entity that the Mainlands has to an owner or manager is the Association. Because the Mainlands is composed of single family homes, and the original developer no longer maintains an ownership or managerial interest, the court has found most of the case law that has interpreted the over 55 test of the housing for older persons exemption to be inapposite to this case. See e.g. Park Place Home Brokers v. P.K. Mobile Home Park, 773 F.Supp. 46 (N.D.Ohio 1991) (mobile home park run by a single manager); Lanier v. Fairfield Communities, 776 F.Supp. 1533 (M.D.Fla.1990) (new development in which almost one half of the lots had not been sold, and were held in trust by a trustee).

Finally, the regulations restate the statutory requirement that 80% or more of the households contain at least one member over 55 years of age. However, that regulatory provision does not contain any additional information that is helpful to the court for

purposes of this case. See 24 C.F.R. § 100.304(c)(1).[4] Specifically, the regulations do not provide any guidance for determining how a defendant is to meet its burden of proof to show that at least 80% of the households contain at least one member over 55.

Application of the Exemption to this Case

There is no dispute as to the law that is applicable to this case. Moreover, most of the facts are not disputed. The parties do disagree, however, as to the significance of the facts, and the application of the facts to the law. The principal dispute is whether the defendant meets the "policies and procedures" prong of the housing for older persons exemption. However, because the plaintiffs also argue that the Mainlands does not meet the "significant facilities and services" prong, and that the Mainlands cannot demonstrate that 80% or more of the units contain at least one member over the age of 55, the court discusses those requirements as well. In doing so, the court acknowledges that the housing for older persons exemption should be narrowly applied. Elliott v. City of Athens, Georgia, 960 F.2d 975, 978-79 (11th Cir.1992).

1. Policies and Procedures

To begin, the court finds that several of the factors that have been developed by the Secretary to determine whether a community meets the policies and procedures prong are inapplicable to this case. The first and second factors that are contained in the regulations are inapplicable because the

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4. The regulations do except newly constructed housing facilities from the 80% requirement until 25% of the units are occupied. See 24 C.F.R. § 100.304(c)(1). However, because the Mainlands has been "built out" for over twenty years, the provision is inapplicable to this case.

Appendix C

Association does not describe the Mainlands to anyone, nor does it advertise for prospective residents. The Association does not perform these functions because it is not the Association's responsibility to attract prospective residents; rather, the responsibility for this task falls on the individual homeowner.

The court finds that with respect to the third factor, age verification procedures, the defendant did establish appropriate mechanisms once the amendments to Title VIII took effect. It did so through the Association's board, and its welcome committee. The court notes, however, that this factor has limited application to this case because the court believes that the statute and the regulations contemplated a situation where a single centralized entity—the owner or the manager—could readily establish the requisite verification procedures.

The Association could have taken steps to meet the fourth factor by requiring lease provisions to include the over 55 requirement. They do, however, urge their owners to call attention to the deed restrictions if they do lease their homes. The court finds that in any event this fact has limited applicability because the community is populated mostly by single family homeowners.

The fifth factor, written rules and regulations, was the subject of some dispute between the parties. The defendant argues that it had passed a bylaw to limit occupancy of the housing units so that at least 80% of the units in the community would be required to contain at least one person over 55 years of age. If true, this would establish to the court's satisfaction that the defendant had indeed published a policy that demonstrated an intent to provide housing for older persons. The plaintiffs counter, however, that the bylaw was illegal because it was enacted in contradiction to the Association's own Articles of Incorporation. The court must therefore determine whether the bylaw is valid.

Appendix C

Article 11 of the Association's Articles of Incorporation requires that the initial bylaws be established by a majority vote at the first meeting after incorporation. Thereafter, the Articles of Incorporation provide that the bylaws may be altered only by a two-thirds vote of the membership. The term "membership" is an ambiguous one. The plaintiffs argue that it means the entire membership of the Association. Under this reading, the bylaws could only be amended if two-thirds of all of the homeowners vote in favor of the amendment. The defendant, on the other hand, argues that the term refers only to those members that are present at a properly noticed meeting to vote on whether the amendment should pass.[5] To construe the term, the court turns to the manner in which the Association itself has interpreted it in the past.

The Association adopted its bylaws on November 23, 1971.[6] Article 10 Subsection B.2. of those bylaws requires a quorum of 75 or more to take action, and two-thirds of the members in attendance to vote in favor of a change or amendment. This requirement was carried over in the bylaws that were adopted in 1975 and 1980. In 1984, the Association again adopted an entirely new set of bylaws. In these bylaws, Article 13 established a new procedure for

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5. The court notes that this interpretation also comports with the Florida Business Corporation Act, Fla.Stat. Chap. 607, which provides that action may be taken by shareholders if a majority of "the votes cast by the holders of the shares represented at the meeting and entitled to vote" favors the action. Fla.Stat. § 607.0727(3) (1992) (emphasis added). This provision is made applicable to non-profit corporations that do not provide for voting requirements in their articles of incorporation or bylaws by Fla.Stat. § 617.041.

6. In fact, the Association adopted a set of rules called the "Constitution and Bylaws". However, the Articles of Incorporation serve as the Association's constitution. Accordingly, the court treats the document called "Constitution and Bylaws" simply as the Association's bylaws.

subsequent amendments. That article provided that the presiding officer would, after discussion, request a standing vote of the property owners in attendance. If two-thirds of that population voted in the affirmative the amendment would be adopted. From this evidence, the court reads the term "membership" to mean those members of the Association who are present at a meeting, and that the two-thirds voting margin therefore refers to a two-thirds margin of the members who are present at the meeting in question.[7]

The 1990 bylaw amendment passed by a vote of 160 to 6. This was clearly in excess of the two-thirds requirement, and was therefore valid. As such, the bylaw provision establishes that the defendant met the written "rules and regulations" factor of the HUD regulations.[8]

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7. In 1988 the Association again effected a wholesale change in the procedure for amending the bylaws. These 1988 changes retained the two-thirds requirement. At the meeting held October 14, 1988 the Association's secretary noted, however, that the revised bylaws were approved by the board and a majority of the property owners present. The fact that these new bylaws were passed by a majority vote reflects either a mistake in the recordation of the events of the meeting, or that the 1988 changes were illegal. Resolution of this anomaly is immaterial for purposes of this case, however, because the two-thirds requirement was a carry-over from the valid 1984 amendments so that if the 1988 amendments were illegal, the court would merely analyze whether the bylaw change in question was passed in conformity with the earlier legal procedures.

8. The court notes that the bylaw is, as a practical matter, unenforceable because the requirement is not also contained in the declaration of restrictions to the individual homes. In other words, if a sufficient number of the Mainlands' homeowners chose to sell their homes to individuals or couples who were all under 55 years of age, thereby bringing the community under the 80% requirement that is required by the first prong of the test, the community would no longer qualify as housing for older persons.

(Cont'd)

Appendix C

Finally, the defendant has provided sufficient evidence to show that it has engaged in actual practices to enforce the rules or regulations that establish an intent to provide housing for older persons. The defendant did send letters to the plaintiffs in this case to enforce the bylaws. It also has implemented screening procedures, through the welcome committee, in an attempt to remain above the 80% requirement.[9]

After applying those factors that are relevant—the defendant's written rules and regulations, actual practices in enforcing lease provisions and relevant rules and regulations, and to a limited extent its age verification procedures—the court finds that the Association meets the "policies and procedure" requirement.

The plaintiffs have furnished the court with United States, et. al. v. TEMS Association, HUD ALJ No. 04-91-0064-1 (HUD Office of Administrative Law Judges, April 9, 1992), a decision by an administrative law judge that found that a community very

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(Cont'd)

Accordingly, the court's decision in this case means only that the Mainlands qualifies at the present time. It does not serve as an adjudication that the Mainlands will always meet the requirements for the housing for older persons exemption. Since the Mainlands meets the 80% requirement for the relevant time period of this law suit, and since the court is concerned with the bylaw provision only to determine whether it establishes the "intent" to create housing for older persons, the actual enforceability of the bylaws is irrelevant to this case.

9. Although the sixth factor also discusses actual practices to enforce relevant lease provisions, the court finds this element inapplicable here. As discussed supra, the Mainlands is a community of single family homes, and, absent an age restriction provision in the declaration of restrictions, the Association has no power to invalidate a lease.

much like the defendant in this case did not meet the 55 or over exception because the community had not proved any of the three prongs as required by the statute. The court disagrees with the approach taken by that administrative law judge with respect to his interpretation of the six factors that are set out in the regulations. In particular, it disagrees with the administrative law judge's application of some of the factors to free standing single homes where the developer retains no overriding interest in the community at the time of the alleged violation. This court believes that disregarding those inapplicable factors is more consistent with Congress' attempt to balance the rights of the elderly with the right of single families to affordable housing.

2. Significant Facilities and Services

The defendant proffered abundant evidence of the types of facilities and services that are designed to meet the needs of older persons in the Mainlands. Review by the court of one issue of the Mainlander, the Association newsletter, showed social programs such as square dancing, bridge, line dancing, pot luck suppers, dinner shows, Las Vegas trips, men's and women's clubs, pancake brunches, horse racing, a Super Bowl party, movies, bingo and bar-b-cues, among others. The court also heard testimony that there is a bowling league, fitness programs, shuffleboard and a swimming pool. This demonstrates that the defendant provides sufficient social and recreational programs. The Mainlander news letter also advertises that the Association provides art classes and Bible study classes. This conforms with the continuing education factor in the regulations The court also heard testimony regarding sewing and other homemaker services, which are specifically mentioned as relevant activities in the regulations. The Association also provides outside maintenance services, and referral services such as plumbing and electrical work. There are no curbs in the streets,

and the homes are all single level, so that there are no physical barriers to the community for people in wheelchairs. The Association also provides blood pressure tests for its residents, it has a telephone reassurance committee and it provides other physical programs on a periodic basis. The Association has in the past planned trips to Las Vegas, Lake Wales and Miami. Participation in all of these activities is encouraged formally through the Mainlander newsletter. On these facts the court finds that this evidence is sufficient to demonstrate that the Mainlands meets the "significant facilities and services" prong that is required by the statute.

3. Eighty Percent Requirement

To prove that it met the eighty percent requirement, the defendant proffered three studies that they conducted. The first study was done in January, 1989. The Association furnished each resident with a questionnaire. However, there was some concern over the validity of that study because there was no procedure for verifying the age of the residents. So a second study was performed in December 1989. The Association attempted to verify the results of that study through the use of social security numbers, however, it later became apparent that that was impossible. Finally, a third study was conducted between November 1990 and April 1991, and the residents' ages were verified through use of a driver's license or some other document. The results of all three studies demonstrated that over 90% of the houses in the Mainlands had at least one resident who was over 55 years of age. The plaintiffs have offered no evidence to contradict the defendant's showing. The court notes that neither the statute nor the regulations provides any guidance for determining whether the defendant's studies are sufficient to demonstrate that the 80% requirement has been met. In the absence of such guidance, the court finds that on these facts,

the defendant has met its burden to demonstrate that at least 80% of the units in the Mainlands were occupied by at least one person over the age of 55.

Conclusion

The court finds as a factual matter that the Mainlands 1 and 2 qualifies as housing for older persons, and therefore is exempt from the provisions of the Fair Housing Amendments Act of 1988 that prohibits housing providers from discriminating against families with children. Therefore, final judgment will be rendered for the defendants by separate order of this court. All findings and conclusions made at trial and not specifically mentioned in this order are hereby adopted.

DONE AND ORDERED.

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APPENDIX D — JUDGE RYSKAMP'S VERBAL RULING FROM THE BENCH

* * *

[923] THE COURT: First I would like to compliment the attorneys for a thorough presentation of all the facts in the case. Both sides can be well assured that they were well represented in this proceeding, that all of the relevant law and facts were brought to the court's attention, and I appreciate that.

The American dream is to have affordable housing. This dream applies to young people starting out and starting families, and it also applies to older people who have completed their work life experience and hope to live their golden years in fellowship with their contemporaries and with opportunities to use the skills that they still have.

I think that years ago we thought that anybody who is retirement age was somewhat incapacitated and not active, and things have changed completely since that time. We have people who are very active and do many things that probably put working people to shame by their inactivity.

So we have here a case that involves some of the most basic desires of human kind. We say essential for life is food, clothes and shelter, and we are dealing with shelter at this time.

I can tell from the past few days that emotions run high in a case like this and the attorneys are advocates for a certain point of view and each point of view is to be considered seriously.

[924] We are dealing with the fair housing law, which was first passed in 1968 and was a needed bit of legislation to prohibit discrimination against people for race, color, creed, national

origin, all of these things that should not exist, and it remedied a bad situation that existed in this country for some time.

Then in 1988 the Congress was presented with facts which indicated that families with young children were having trouble finding affordable housing and very wisely they decided to address this issue and they addressed it in the amendments to the fair housing law.

However, whenever we start manipulating either the economy or society it causes a lot of problems, and I am sure they had a very difficult time in crafting this legislation in such a way that all interests are adequately protected.

When we look at 3607, the exemption clause, the first paragraph talks about religious organizations and private clubs, and there are all kinds of exemptions there, because once you start legislating what people can do there are many impacts that result from that.

Of course, Congress did not want to disrupt legitimate recognized housing for older persons, so they carved out an exception to the fair housing law which attempted to provide the necessary protection for these people, who after many years of working and raising their own [925] children have every right to expect to live in a community of people who are compatible and not to be disturbed by other people's children. Now, of course, there is nothing in the world to prevent people from living in any kind of community if they want that type of existence, but some people prefer this type of living.

So the issue before the court is really a simple issue, fraught with a lot of emotional arguments, but an issue of whether or not

this community, Mainlands 1 and 2, meets the criteria set forth in Section 3607(b) to qualify as housing for older persons.

Now, we have talked about how difficult it is to get four or five hundred people to do anything, because people have a lot of strong opinions and viewpoints, and I am sure that when this bill was going through Congress they had the same difficulties.

It seemed like the people who were always raising the objections were the representatives and senators from Florida and Arizona. And why is that? Because they have large communities of retired people and they are anxious to protect their constituents' interests, so as it often happens, and as I often see legislation, it's some sort of compromise, a statute that has a lot of vague and ambiguous terms because nobody wants to narrow it too closely, and I suppose the attitude is well, we will let the courts figure [926] that out, and this law is so new that we don't have a lot of judicial interpretation.

I made a reference earlier to the fact that there could have been a jury here. It sure would be a lot easier for me to charge the jury on these three elements and say you heard the facts, go ahead and decide it, but that's not what the parties have chosen to do.

I think sometimes the attorneys think they are doing the court a favor by not asking for a jury trial. Let me tell you, when a jury trial is over the case is over, and it just begins when the court has to be both the arbiter of the law and of the facts.

This community of the Mainlands was developed sometime in the sixties. I am not sure whether it was 1964 or 1967. I have heard both dates, but the developer, realizing that a number of people come to Florida for the winter, decided that many of these people might be prospects for permanent residence, and the brochures and

the type of neighborhood that was developed I have no doubt that he intended that they would be for people who were either retirement age or close to retirement age.

Now, we talk about retirement age as though it is 65, and I am envious of many of my friends who tell me they are retired at 45 and 50 and 55, so that's not cast in stone either. Retirement age can be whatever age that people [927] choose to retire, and in marketing property, as was noted here, you don't say this is property for old people, you don't say this is property for retired people. I'm sure that the people who have earned their degree in advertising tell them that's not a good sell, you should use a little bit more euphemistic terms and they will all understand what you are talking about, and that seems to be with what was done here.

It was described as an adult community, and to reinforce that the deed restrictions were placed on the property which prohibited children under 16 years of age from living on the property.

That worked pretty well for close to 25 years and Congress decided that there were other concerns that had to be dealt with, so they passed this law, and it is suddenly like you have been playing the game by certain rules for years and somebody says we are going to change the rules this year, and that happens in the National Football League, and I am sure in baseball now and then, and it always takes people a little while to figure out what these new rules mean. Some of the players still play according to the old rules until they get accustomed to the new rules, and that's what we have here.

So where in the past you described your neighborhood as one in which children under 16 were not present, you now have to think in terms of people over 55.

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[928] So the court really has to look at the facts here and see once whether this community, at the time of the law and shortly thereafter, complied with what Congress was talking about when it talked about housing for older persons.

Now, the statute carves out three prongs, and they are intentionally factual. When you look at the first prong, which says significant facilities and services, Congress didn't choose to define what services are significant. They said we will let somebody figure that out. Maybe we will let the regulators decide that.

On the third prong they use the language demonstrate an intent. Now, a lot of principles in law aren't terribly clear, but one is, that I have understood for the last 35 years, is that intent is always a question of fact. It's not a question of law it's a question of fact.

What is somebody's intent? Sometimes we have to go, we have rules for construing the intent of legislation, what was the intent of the legislature when they enacted it, and we develop a series of rules to try to understand legislative intent.

So to the extent that the court analyzes the facts under these three requirements, the court is basically doing what any jury would do, apply what common sense that you have been bestowed with in light of the evidence that you have heard, and so I propose to go through these first three [929] prongs and analyze them.

The first one under the law says the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, and then the rest of it really doesn't apply because it's a contingency or if the provision is not practicable, and we are not going to go into that.

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So what we have to decide is are there significant facilities and services specifically designed to meet the physical or social needs of older persons.

Now, we get some guidance in this from the preface to the regulations. I am looking at page 719 under the title Significant Facilities and Services, and HUD acknowledges that a large number of commentators viewed the definition in the proposed paragraph (b)(1) as requiring facilities and services on the order one might expect to find in a facility for severely disabled elderly persons who are not able to care for themselves.

Other commentators want to qualify the 55 or over exemption and want to know precisely what services and facilities must be provided in order to qualify for the exemption.

Then they go on to the bottom of the page and they say "Based upon the reaction hundreds of commentators had to the proposed definition of significant facilities and [930] services designed to meet the physical or social needs of older persons, it appears that the presence early on in the definition of congregate dining facilities and an accessible physical environment may have created the impression that only housing for older persons who are not capable of living independently would satisfy the requirements of paragraph (b)(1).

"The Department wishes to stress that a housing facility may have significant facilities and services designed to meet the physical or social needs of older persons and still provide housing for active older persons who live very independently. A housing facility, for example, need not necessarily have congregate dining facilities or an accessible physical environment in order to qualify. In fact, many of the facilities and services on the list can readily be associated with active older persons."

Then they go on to comment that they must be significant and they say "The services and facilities will necessarily vary based upon the geographic location and the needs of the residents. However, it is clear, for example, that the installation of a ramp at the front entrance of a housing facility would not constitute a significant facility designed to meet the physical needs of older persons."

Now, in adopting the regulations, which is Section 100.304(b)(l), certain facilities and services designed to [931] meet the physical or social needs of older persons include but are not limited to, and then they list a number of them, and then they point out the housing facility need not have all of these features to qualify for the exemption under this paragraph.

Now, I have taken these various items that were listed as illustrations, and frankly I have some trouble with some of the language. I am not sure what they mean, but they start out by saying social and recreational programs.

I looked through the Mainlander, and under social programs I found square dancing, bridge, line dancing, pot luck supper, dinner show, Las Vegas trip, men's club, women's club, pancake brunch, horse racing, Super Bowl party, movie, bingo, Bar-B-Q, among other things. That's probably out of one issue. So they are providing a good deal of social programs.

Recreational. There is a bowling league, there is a fitness programs, there is shuffleboard, there is a swimming pool, and based upon what I see here from the testimony I have heard, they have all of the recreational facilities they want.

They have a big yard behind the club house. If they wanted

tennis courts, I am sure they would put tennis courts in. If they wanted lawn bowling, I am sure they would put that in. But I think that they have got all of the [932] recreational facilities that they care about.

The next thing was continuing education. I saw from the Mainlander that there was advanced bridge. I don't know if that's teaching or competition. I am not sure whether to call that continuing education. They have art class. They have Bible class. I am sure since they run their own program, if they had any other continuing education they wanted, they would have it.

Information and counseling. That category is rather vague, but they are given health information and certainly the support group that deals with older people who have concerns I think falls under that category.

Then they have what they call recreational homemaker outside — I don't know why recreational appears here again, whether that's recreational maintenance in referral services, in homemaker maintenance and referral services, apparently those two are tied together, but I know that they have bazaars and they do sewing and things that certainly could be related to homemaker type services.

Outside maintenance services are the lawns and the sprinklers, and they provide referral services for others, like plumbers, electricians and things of that nature, so I believe they are providing their services.

An accessible physical environment. Well, we know ramps alone don't do it because ramps are needed in many [933] facilities, are required by the federal legislation on access for the

handicapped, but they are one level homes. There are no curbs in the streets. There doesn't seem to be any physical barriers to wheelchair access, so I feel that they meet the requirement here of an accessible physical environment.

Emergency medical health programs, health care of programs — it seems to be a misprint. They have the blood pressure testing. They have the telephone reassurance committee. Apparently they have other physical programs that are available on periodic basis as needed.

Congregate dining facilities. Well, they don't have that because these people don't choose to want to have their meals provided to them, although they get a lot of social contact from the Bar-B-Q's and the parties that they have, the pot luck dinners, but this is not designed as a facility that we often see for older people where you have a room and you go to the dining room for your meals. Those people don't want that and of course that's not required to meet the definition.

Transportation to facilitate access to social services. I don't know that they own a bus, but I saw where there were trips to dinner theater, there was a Las Vegas trip, there is a Lake Wales trip, the trip to Miami, and probably a lot of other trips I am not aware of.

[934] I see the men were involved in horse racing. I didn't hear a lot about that. I assume that they go to the track, unless it is some other kind of horse racing that I am not aware of, but I think that they provide all of the outside social activities that they care for.

Then it says services designed to encourage and assist residents to use the services and facilities available to them. Well, in reading the Mainlander and everything I have seen, they have

urged people to participate. Some people don't want to participate. Some people want to stay home and do their own thing. They may feel an exciting evening is watching television instead of playing bridge, so they have the right to choose that, but I think by any definition that I can see, that the Mainlands 1 and 2 meets the requirement of the first test, that is, the existence of significant facilities and services specially designed to meet the physical or social needs of older persons.

Contrary to that, it has been alleged well, these homes are like any other homes. That's true, they are. That's exactly what they want. They didn't ask to be in a nursing facility.

When these homes were built I don't think it was common to put in rails for people who were disabled. I'm sure that what we know now about architectural features, maybe that would be considered, although I think some people [935] would be offended if they were shown a house that had wheelchair access and was designed with maybe low sinks for people in wheelchairs. They might say I don't want to live in a place like this, this is for people who are incapacitated, so I don't see that as any great problem, that they don't have some of these facilities.

They are all two bedroom houses. I think that was done with design, that you can have your children and maybe some grandchildren visit you under cramped quarters, but it's not the type of housing that generally young people with families are looking for.

I think it was interesting, one of the plaintiffs moved out of the two bedroom into a four bedroom because they were starting a family, and I think that's what people are generally looking for.

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There is no room to put swimming pools on these properties. There is really very little room to expand these houses, and the facilities, the arts and crafts, the club house, the two pools, the heated pool, the shuffleboard — you know, shuffleboard, I don't know many young people who are turned on by shuffleboard. That seems to be a favorite sport of people who are retired, so the whole thrust of this community is designed for older people and for their interest and their activities, so as a finder of fact I would find that the community does provide these significant facilities [936] and services.

Well, facilities and services. Services — we talked about facilities, we talked about services, they provide both.

Now, the second requirement is that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit, and the regulations to clarify that say at least 80 percent of the units in the housing facility are occupied by at least one person 55 years of age or older per unit, except newly constructed, and we are not concerned with that.

That's all the regulation tells us. They don't tell you how you determine this, whether you ask people their age whether you get a driver's license, whether you get some other proof of age, and it appears that HUD has taken the position that it must be verifiable age.

Well, the only place I see verifiable age is not under the 80 percent rule, but under the rule that talks about policies or procedures, and the age verification procedures seem to be directed to the fact, that when people are coming into the facility that you verify their age, so now the burden of proof is upon the neighborhood, the Mainlands, to prove the age, and they first sent

out a poll, which seemed perfectly reasonable, to say tell us what your age is, and somebody says oh, well, they could have lied, you [937] know. Well, on second thought maybe they could have, so they say well, how can they verify that? There must be some way to do that with Social Security, so they did another one with Social Security. Apparently you can't do it that way. So they did a third one, and that one they required either a driver's license, some document that had their age on it.

I guess the problem, when adopting new rules without sufficient guidelines and definitions, that you will go through a trial and error procedure. That's what they did. They tried this and when that wasn't good enough they tried that, and finally you get to the point where you determined the number.

If I can digress for a moment, I think I remember back when I had a case against the Corps of Engineers and I was representing a developer, and they said you can only build if this is above the high water mark.

I said fine, here is a survey showing we are above the high water mark. That's not good enough, you have to have a special engineer to do it. So we got a special engineer to do it. They said oh, no, we can't accept that, you have to have a water gauge. So we put a water gauge on it and had to have a one year study and the project remained idle for one year, and when we gave them the water gauge study they said no, we are not going to accept that, we are going to do our own water gauge study. So the government did [938] a fourth study and that showed they were above the mean high water mark.

Finally after five years the government says yes, you are above the mean high water mark, but in the interim we have passed new regulations that say you can't build on this property .

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You know, it seems like I see a lot of similarity here. Tell us how many are over age. Okay, here is the answer. Oh, that's not verified. Well, our block captains know them and are you suggesting they would lie? I mean, on the census that the government sends out you don't require proof of age or proof of employment, you just answer the questions.

A lot of important decisions, a lot of money is allocated based on the United States census and people could be lying through their teeth.

Well, it seems to me that regardless of which census you look at they have clearly established 80 percent, and I don't think we are talking about 81 percent, I think we are over 90 percent. I wouldn't have any hesitation in finding that it was over 80 percent.

Now, again, this is a factual issue. It just says that at least 80 percent of the units are occupied. I suppose I could have, if I had known this was a big issue, appointed a special master who would go out and investigate [939] this and accumulate voting records and go to every door and check on every house, if I knew that this was going to be a an issue.

I had representatives of the homeowners testify and I had a representative of the Justice Department testify, and I have to make a credibility determination. I do find that the representatives of the Mainlands were more credible than the representative of the Justice Department. Not that she was misrepresenting anything, I am not sure she knew exactly what she was supposed to do, and so I would have to make that judgment call and credibility determination based upon what I heard from the witnesses.

The third requirement under the statute is the publication of

and adherence to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

I haven't referred to any of the cases yet, and I will in a few minutes. It seems like most of the cases that I have read were more concerned with the first prong, significant facilities and services, and by and large this last area has been ignored.

Now, I think what Congress had in mind, and I think that's what we are supposed to do, is to glean the congressional intent. They had in mind facilities like mobile home communities where one person or one corporation [940] owns the facilities and is free to set the rules and regulations. You lease out a certain pad and when that lease is up you are free to lease to someone else.

They may also have had in mind apartment buildings, rental facilities, where one person owns the building and you adopt certain policies and procedures as to who you are going to rent to.

It would have been interesting had someone on the floor of the senate or the house asked the question how does a community of independent freestanding homes demonstrate an intent through their policies and procedures to provide housing for people 55 or over when each person who owns a facility is free to sell to who ever it wants to.

Well, of course, that's what we have been talking about. This seems to be the thrust of the government and the plaintiffs' position that this is the weakness in the Mainlands position.

There is no question but that if we started the Mainlands all over in 1964, build all the houses, and instead of selling them to

people the developer says I will rent them to you, it's the only way you are going to get these houses, I will rent them to you and I will provide these services and you can have your organization, then it would have been so simple to comply with the law, because you have got complete control over who goes in and out.

[941] The developer didn't do that. He felt these people didn't want to be renters, they wanted to be owners, and they wanted to take charge of their homes and take charge of their neighborhoods.

So the question is is the critical issue here the intent that we are looking for or is it the policies and procedures. Well, maybe the answer is somewhat in between. You glean intent from policies and procedures.

Now, HUD has developed some regulations which are under (c)(2). They start out saying the owner or manager of a housing facility. Right away that tells me they are not thinking of a community like this, because this community has no manager and it has no owner.

Now, everybody owns their own house. I don't know if housing facility is defined under the regs or under the statute, but what it would call to mind to me would be a condominium, an apartment building, a motor home park, something like that where the owner or manager has control over all the units, so it says the owner or manager of a housing facility publishes and adheres to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

Then it says the following factors, among others, are relevant in determining whether the owner or manager of a [942] housing facility has complied with the requirements of this paragraph (c)(2) of this section.

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Number 1, the manner in which the housing facility is described to prospective residents. Well, if we say that the owner or the manager is the civic association, they don't describe the facility to prospective residents. It's not like they do a brochure and urge people to come in.

They do describe it orally when maybe somebody is thinking of buying there and they might go by the club house and find an officer or somebody and say tell me what this community is like, and I don't think that that's a policy or procedure because everyone who they talk to may have a different idea of exactly what they like best about the community.

So I find that this subrequirement doesn't apply to this neighborhood. It might apply to an apartment building, it might apply to a mobile home park, it might apply to some sort of rental facility, but it just has no application to this case.

The second one is the nature of any advertising designed to attract prospective residents. Well, the original developer did some advertising to attract prospective residents, and we looked at that and it certainly, it would appear to me, that it was designed for retirement age people, but that's not what they are talking [943] about here. The civic association doesn't do any advertising designed to attract prospective residents.

The real estate brokers might do some advertising, but they are talking about what the owner or manager does, not what any real estate broker does. So I find that Section 2 does not apply to this particular neighborhood.

Number 3, age verification procedures. That is when people are coming in as new residents, that some effort is made to verify

their age. Well, until this act was passed, there would be no reason for the civic association to verify the age of the people coming in because there was no prohibition against age except that maybe there were to be none under 16, and so I believe from what I heard that they did make efforts to verify that somebody wasn't under 16, but this regulation talks about verifying whether somebody is over 55.

Now, after the law went into effect, it's clear to me that after studying the matter, first through a committee, probably through a members meeting, they said we should have a screening procedure, and they eventually did adopt a screening procedure.

Now, I am sure that screening procedure is being attacked the same way that the bylaws are being attacked, and we will deal with that in a moment, but I do find that there was an attempt to verify the age.

[944] Now, even if they verified the age, what could they do about it? If somebody bought a house who was under 55, they were really powerless to stop it. What they were capable of doing is preventing somebody from 16 coming in, assuming they now qualify as housing for older persons.

So I think that this again indicates an intent by the drafters of this particular regulation to fit this into a situation where you are renting or the developer is selling subject to certain conditions, and so it may have limited application here, but not total.

The fourth one is lease provisions. The civic association doesn't lease to anybody. They do urge their owners if they lease to call attention and to lease to the provision in the deed restrictions.

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Number 5, Written rules and regulations. The civic association has attempted to adopt bylaws. Now, I suppose we could say the question of whether these bylaws are valid would be the subject of a whole lawsuit under Florida law. I don't know that in this case I have been asked to declare their bylaws invalid. Has anybody asked that? That's just an argument.

MR. MASINTER: Yes, that was one of the claims we brought in our amended complaint.

THE COURT: Well, I don't know that I have to decide that, but I will make some observations.

[945] Article 11 of the articles of incorporation say the initial set of bylaws shall be established by a majority vote at the first meeting after incorporation, A majority vote. Does that mean of every incorporator? We know that if a corporation calls a meeting of stockholders and everybody doesn't come, then it's a majority of those who are there.

A majority vote at the first meeting. Thereafter the bylaws may be changed, modified and amended only by a two-thirds vote of the membership.

Now, what does of the membership mean? Does it mean — to me it means the the membership of the — actually this is a not for profit, so whoever drafted this might be thinking in terms of a for profit corporation where you have a meeting of the board of directors and you have a meeting of the stockholders.

Now, you can't say stockholders in a nonprofit organization because you do not own stock, so when you deal with nonprofit corporations, you deal with membership as opposed to stockholders.

Now, did the drafter of this mean that this is a meeting of two-thirds — a two-thirds vote of the members who are entitled to vote as opposed to the directors who may have directors meeting? I don't know what they meant. It's certainly not very good draftsmanship, and one of the principles of construing ambiguous language, language which [946] can be construed in two or more ways, would be to see how the people themselves construed it, and I see that later on they adopted the constitution and bylaws as revised 10/10/75.

Now, the first observation is this can't be the constitution because the articles of incorporation are the constitution, but they probably didn't have a lot of legal help on this and thought that they needed — they probably got a form from someplace saying constitution and bylaws, those two go together, but the constitution of any corporation are the articles of incorporation.

Now, in this first set, which was adopted in '75, apparently, in Article 13(c), it says Article 10 of the constitution requires, and I don't know what they are referring to there. Let's see what Article 10 is. Article 10, that's election and officers of board members. Article 10 of this constitution requires a quorum of 75 or more to be in attendance to pass favorably, a vote by two-thirds of the members in attendance must vote in favor of the change or amendment.

Well, it sounds like at this point they decided that two-thirds of the members in attendance must vote to change this, these bylaws, or as they call it constitution.

Now, that apparently stood unchallenged from '75 until 1984, when they did a new constitution and bylaws, and in this section it says the method — in this case they had a [947] whole Article 13

that spelled out step-by-step for the way you change the constitution and the bylaws, and after presenting it and discussing it and allowing time and everything, they say the presiding officer shall request after discussion a standing vote of those in favor of the amendments. Approval must be by two-thirds of the property owners in attendance. So again they were indicating their interpretation of the articles that it meant of those who attended.

I am sure if any attorney thought that when drawing that you would have to have two-thirds of 526 lots of people who are not there very often, and I don't know how many of the people in this community go north in the summertime, he would realize immediately the futility of such a regulation, but that's not to say lawyers are always so smart when preparing these things either.

By 1988 it was amended once again, the changes in the constitution and bylaws, and this time it says this revised issue of the constitution and bylaws was approved by the board and a majority of the property owners present at the Mainlands 1 and 2 Civic Association regular meeting held on October 14, 1988 and is in effect until amended. Well, it seems like there they didn't even comply with the requirement of two-thirds.

Now, it may be that in writing up this they said [948] there was a majority, but there may also have been two-thirds. We don't know unless we have the vote, so this may or may not be legally adopted, but the key language and critical language should have been to say that it was approved by two-thirds.

When you look at the paragraph before, the (e) paragraph, it says the president shall request — showing how to amend the bylaws, shall request after discussion a vote of those in favor of the amendments or reissue of the bylaws. Approval must be by two-

thirds of the property owners in attendance. So there was certainly a recognition that two-thirds still was the requirement, but this latter language creates some ambiguity.

Then again in 1990 the bylaws were amended, and all I have here is just the amendments. As I recall, the vote was like, what was it, 165 to 7 or something like that?

MS. KAMEMRMAN: 160.

VOICE: 160 to 6.

THE COURT: So it was clearly two-thirds of those who were present, and of course I understand the government and the plaintiffs are still arguing and still contend that you would need a vote of two-thirds of 526.

Well, I think that the articles of incorporation are ambiguous. I think the reference to the membership was to distinguish it from the meeting of the board of directors, [949] and through numerous amendments the parties have construed this when there were no adversarial positions being taken to mean two-thirds of those present at a meeting.

Now, the simplest thing to solve this problem would be if the Mainlands went out and revised their declaration of restrictions. We may not even be here if that were done, or if it were done in a timely manner, and I might say for the future that if they hope to maintain this as a community for older persons they better do this, because the way things stand now, if anybody sells enough property to people who are under the 55 requirement, you could lose your exemption, and there is nothing to stop that, and I can understand the brokers predicament when they say we are being

told that you can't do that. I am sure that this law has given them nightmares as to what they can do and say in selling property, but a deed restriction is something that puts the world on notice.

Now, the bylaws are, as far as I can see, totally unenforceable, whether validly enacted or not, because you can't prohibit by your bylaws somebody from coming in who is under 55 years of old, and so you have got to do something different, and you haven't done it so far, but the question, the key question that's being asked under this third prong is what is the intent of the, in this case the association, based upon its rules and regulations, and from all I can [950] gather is that the intent of the civic association is to keep it exactly the way it is. And what is it? It is a community of probably 90 percent of the people who are over 55.

Now, the argument is made well, you are letting a minority control, that these regulations were adopted by less than everybody, and there is something very democratic about corporations, and I guess there is a comparison to our democratic form of government, that all you are required to do is advise people of what the issues are and if they choose not to participate, that is their choice.

People are independent and I can think of numerous clubs that I was in for many years that I never attended a meeting and never voted on an issue, because it wasn't important to me. I had no concern about what might happen, and if they suddenly raised the dues, I said well, I should have been there and said something, but I didn't, and I have to live with it because I had notice. They told me they were going to consider raising the dues, I wasn't there and whatever they did I'm stuck with.

Now, the only thing we are talking about here is what is the intent, what are they intending by what they are trying to do? I

think they are trying to amend the deed restriction, and if they knew a way to get all these people or get enough people to sign on to this, they would do so, and that would solve the problem.

[951] I don't know if they think that they have to have a meeting where everybody is in attendance, and I am not in a position to give legal advice. When I raised my right hand and took this office, the law said I cannot give legal advice.

I guess I could speculate that if you send out a petition and asked it to be notarized and give your indication as to consent to certain declaration amendments, that may or may not do it, I don't know. Maybe the laws of Florida are going to be an obstacle, but all I can gather is these people had every intent to keep this as a community over 55, and whether they did it effectively or ineffectively, the intent was there, and here we are dealing with a new law and new procedures.

You know, maybe ten years from now there won't be any litigation on this any more, all the issues will be resolved, everybody will know exactly what to do, but until we get to that point we have got to go through this painful process of analyzing what did Congress mean, what do the regulations means, and pretty soon HUD will probably have forms that they will send out to all these communities saying this is what you have to do, check this and you are going to qualify, and it is going to save a lot of time with investigators and everything else, and it will save a lot of lawsuits.

[952] All right, the last thing that is listed is actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations.

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Well, the lease provisions don't apply unless you would say that where there are leases from individual owners to others, you go around, say our rules are you have to have swimming pool tags and you have got to do this and you have got to do that, but we are talking about provisions dealing with over 55, and I do think that they go around and say, from what I have heard, that this is a community of older people.

Now, they don't really have to enforce it to the extent that they stay above the 80 percent, because otherwise the court or the Congress and HUD would be putting just about an impossible burden on them, so they are well above the 80 percent. They can advise people of what the requirements are, but they can't invalidate a lease, and it says, it also says practices of the owner in enforcing relevant rules and regulations.

Well, they are certainly enforcing their deed restriction. That's what this lawsuit is all about. They are certainly trying to screen people, but the fact of the matter is that one person can sell their house to another person without any notification to the civic association, and I think when the civic association knows they send out the [953] welcome committee. The welcome committee brings the necessary papers, brings them all the guidelines and does what they feel they can do, and so I think that although they have ineffective rules and regulations, these rules and regulations demonstrate an intent, and I think the intent is there.

Now, before we go further, since we are dealing in a very new area, the court has tried to get as much guidance from anybody who has been down this road before. We don't want to reinvent the wheel every time a case comes up, and that's not the way our legal system works, so I have pulled the cases that seem to deal with this.

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Park Place Home Brokers v. P.K. Mobile Home Park, which is the Ohio decision of Judge Potter, and I have read that case, and that, again, as I said, is a mobile home park and it's fairly simple for somebody to look at the regulations and immediately do what's necessary, because owned the park and you can adopt the regulations. The court found in this case they didn't do so and I have no quarrel with that, but it doesn't help me in a case of a neighborhood of many freestanding homes which are privately owned.

I looked at Lanier v. Fairfield Communities, which is Judge Castania's opinion from the Middle District of Florida, and in this case you had a development that was just being built. Approximately 110 of 260 planned homes had been [954] sold. The unsold lots are held in trust by the trustee pursuant to a document of trust, and there were — it was a declaration of conditions, covenant and restrictions for Fairfield Point Alexis, and in analyzing that opinion, which I read very clearly, I felt the case did not apply, certainly did not apply to a situation where you have got a 25 year history of a neighborhood that has been serving the needs of older people.

You know, it's kind of interesting. The 55 year old requirement, suddenly the intent has to be 55. Nobody knew that. They picked that figure out of the air. They could have said 60, they could have said 50, and suddenly everybody has to have an intent as to that one age, and that's kind of like changing the rules of a football game in the middle where you are playing the game according to known rules and suddenly someone says wait a minute, we are going to change the rules, so everybody has to reformulate their thinking, and there is no question in my mind that prior to the enactment of that law people weren't thinking 55.

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Maybe for the speed limit they were thinking 55, but they weren't thinking about it for age. They weren't thinking of any age necessarily. They were providing the type of environment that appealed to the people who were living there, and the people who were living there, at least 90 percent I find are over 55.

[955] Now, there is another case from the Middle District, Judge Kovacevich's case in Senior Civil Liberties Association v. Kemp. This case is unusual to the extent that it was basically a suit brought by the representatives of the older residents to challenge the law. So much of the decision was based upon the constitutionality of the law and the regulations, whether they were vague, whether there is a denial of due process and whether it was retroactive and Tenth Amendment provisions and rights of privacy, and Judge Kovacevich did a beautiful job of analyzing all of these constitutional arguments, but in dismissing the case of the plaintiffs she makes the observation the court finds the communities meet the requirements of the exemption.

Now, this was done on summary judgment as I recall, was it not, and I thought she must be a lot smarter than I am to get rid of this whole case on summary judgment without going through all the facts and then concluding that they meet the requirements of the exemption.

But she did have some interesting comments here about the significant facilities and services. Let me just read a portion of it which I think was exceptionally good language.

"The services and facilities present in adult only housing run from large complexes with numerous facilities and services to small apartment complexes with a pool and a [956] recreation room. This, along with the examples given in the rules, tends to get

individuals who are trying to interpret the act caught up with quantity over quality.

"Generally the extent of the recreation facilities and services offered at any particular community is related to the size of the complex and the original selling price of the units. Keeping in mind that the legislature intended these exceptions to be flexible in order to provide for varying desires of senior citizens, it is apparent that those senior citizens would not move into a complex that they didn't find an adequate combination of affordability and desirability. A small complex with just a pool and a recreation room might be all that was desired by its residents because the resident's main desire was a quite age homogeneous environment. To those residents this complex contains significant facilities and services specially designed to meet the physical or social needs of older persons."

Then she goes on to deal with whether or not this is unconstitutionally vague because it is a compromise between the price of the house and the desires of the particular resident.

She says additionally, "This court finds that the specifically designed to meet the physical or social needs of older persons prong is not unconstitutionally vague because [957] the bottom line is the age of the persons using the facility. The physical needs will automatically be met in the future due to contemporaneous handicap legislation and the social needs will be met because no matter what the extent of the facilities, the age of the people using them is what is vital. A gathering of older persons who have reached the same place in life and have a lot in common, no matter where it is or what the setting, meets the social needs of these individuals."

I certainly agree with that language, and if it isn't clear at this time, I think that the Mainlands 1 and 2 are meeting the needs of the people in the community.

Now, there is a decision that was rendered just 21 days ago by an administrative law judge. That's what we have been calling the TEMS case. I have read that case carefully because that case also originates in Tamarac.

Of course, I didn't hear the evidence in the TEMS case, but I am not going to say that I am going to reconcile the TEMS finding with my finding.

Frankly, I disagree with the approach and the methodology of Administrative Law Judge Andretta. He found that the community failed in every respect to meet the requirements, and he then analyzed first whether there was 80 percent who were over 55 and he looked at their exhibits and he found discrepancies and errors, and I don't know how close [958] that put it to the line, but he just threw it all out and said you haven't proved that there was 80 percent.

Well, I don't know what evidence he heard, but I find from the evidence I heard that there is over 80 percent.

Then he went to what he called the second test, which is the policies and procedures requirement, and rather strictly adhered to the six elements that I just discussed.

Now, as I said, most of those elements I don't feel apply to a community — I think his error was trying to force these six requirements into a community of freestanding homes where the homes are owned individually, and I can see how he came out with

this result, but I don't think that those requirements even fit what we have before us, and again, I feel that what Congress was talking about is you have got to see that the people intend this to be a community of people over 55, and I am emphasizing the intent and then I look to the policies and procedures and I see everything that I see there indicates to me an intent to do this.

Now, he then goes on to the third test first alternative. I am not sure exactly what he — I guess this is the test for significant facilities and services. Why that's the third test — oh, I guess you could go one or the other. I see what he is doing. He relied heavily on Murphy, which is another administrative law decision, and I don't mean to denigrate in any respect the administrative [959] procedure, but I do feel that they were not looking at the broad picture that Congress was.

Now, Congress is looking at trying to balance the rights of young families against older Americans, and they said there must be a compromise here some way. We are not going to decimate the housing for older people. We are just not going to do that. That's very legitimate and we want that to remain.

On the other hand, we have a real desire and a legitimate desire and a commendable desire to make sure that people with young families can get affordable housing, and some way we are going to have to draw that line. We can't all agree where the line is, so we are going to draw a very broad and fuzzy line and let HUD draw some regulations and then we are going to let fact-finders determine whether you meet the test or not.

That's the best I can see what Congress did, and it seems to me that the administrative law judge in the TEMS case didn't have a sufficient sensitivity to the balance that Congress was trying to

make and in a rather mechanical way looked at words on paper and said well, you just don't meet this test.

That's a long way of saying I am just not buying into the TEMS decision at all. He may be absolutely right and I may be 100 percent wrong, but I am not buying into [960] that. I disagree with it.

Based upon what I have seen, what I have heard, applying the law as I see it, applying the facts as I have found them, I find that the Mainlands 1 and 2 does qualify as an exempt facility and I will deny the relief of the government and the plaintiffs and grant the relief requested by the defendant.

This is an oral ruling. It's not intended to be the final ruling. What I will probably do is have Rick write this up and we will try to put this in a more readable and rational basis, and there may be some variations from what I have said, and there may be some things I haven't thought of that might appear in any written order, but that's my ruling.

* * *

APPENDIX E — THE HOUSING FOR OLDER PERSONS EXEMPTION FOUND AT 42 U.S.C. § 3607(b)

§ 3607. Exemption

* * *

(b) Numbers of occupants; housing for older persons; persons convicted of making or distributing controlled substances

(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing —

> (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
>
> (B) intended for, and solely occupied by, persons 62 years of age or older; or
>
> (C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

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(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

(A) persons residing in such housing as of September 13, 1988, who do not meet the age requirement of subsections (2)(B) or (C): Provided, That new occupants of such housing meet the age requirements of subsection (2)(B) or (C); or

(B) unoccupied units: Provided, That such units are reserved for occupancy by persons who meet the age requirements of subsection (2)(B) or (C).

* * *

APPENDIX F — PORTIONS OF THE HUD REGULATIONS DISCUSSING 55 OR OVER HOUSING COMMENCING AT 24 CFR § 100.304

§ 100.304 55 or over housing.

(a) The provisions regarding familial status shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit, *Provided That* the housing satisfies the requirements of § 100.304 (b)(1) *or* (b)(2) *and* the requirements of § 100.304(c).

(b)(1) The housing facility has significant facilities and services specifically designed to meet the physical or social needs of older persons. "Significant facilities and services specifically designed to meet the physical or social needs of older persons" include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them (the housing facility need not have all of these features to qualify for the exemption under this subparagraph); or

(2) It is not practicable to provide significant facilities and services designed to meet the physical or social needs of older persons *and* the housing facility is necessary to provide important housing opportunities for older persons. In order to satisfy this paragraph (b)(2) of this section the owner or manager of the housing facility must demonstrate through credible and objective evidence that the provision of significant facilities and services

designed to meet the physical or social needs of older persons would result in depriving older persons in the relevant geographic area of needed and desired housing. The following factors, among others, are relevant in meeting the requirements of this paragraph (b)(2) of this section—

(i) Whether the owner or manager of the housing facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons either by the owner or by some other entity. Demonstrating that such services and facilities are expensive to provide is not alone sufficient to demonstrate that the provision of such services is not practicable.

(ii) The amount of rent charged, if the dwellings are rented, or the price of the dwellings, if they are offered for sale.

(iii) The income range of the residents of the housing facility.

(iv) The demand for housing for older persons in the relevant geographic area.

(v) The range of housing choices for older persons within the relevant geographic area.

(vi) The availability of other similarly priced housing for older persons in the relevant geographic area. If similarly priced housing for older persons with significant facilities and services is reasonably available in the relevant geographic area then the housing facility does not meet the requirements of this paragraph (b)(2) of this section.

(vii) The vacancy rate of the housing facility.

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(c)(1) At least 80% of the units in the housing facility are occupied by at least one person 55 years of age or older per unit *except that* a newly constructed housing facility for first occupancy after March 12, 1989 need not comply with this paragraph (c)(1) of this section until 25% of the units in the facility are occupied; and

(2) The owner or manager of a housing facility publishes and adheres to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. The following factors, among others, are relevant in determining whether the owner or manager of a housing facility has complied with the requirements of this paragraph (c)(2) of this section:

(i) The manner in which the housing facility is described to prospective residents.

(ii) The nature of any advertising designed to attract prospective residents.

(iii) Age verification procedures.

(iv) Lease provisions.

(v) Written rules and regulations.

(vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations.

(d) Housing satisfies the requirements of this section even though:

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(1) On September 13, 1988, under 80% of the occupied units in the housing facility are occupied by at least one person 55 years of age or older per unit, provided that at least 80% of the units that are occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80% of such units are reserved for occupancy by at least one person 55 years of age or over.

(3) There are units occupied by employees of the housing (and family members residing in the same unit) who are under 55 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(e) The application of this section may be illustrated by the following examples:

Example 1: A. John and Mary apply for housing at the Valley Heights apartment complex which is a 100 unit housing complex that is operated for persons 55 years of age or older in accordance with all the requirements of this section. John is 56 years of age. Mary is 50 years of age. Eighty (80) units are occupied by at least one person who is 55 years of age or older. Eighteen (18) units are occupied exclusively by persons who are under 55. Among the units occupied by new occupants after September 13, 1988 were 18 units occupied exclusively by persons who are under 55. Two (2) units are vacant. At the time John and Mary apply for housing, Valley Heights qualifies for the "55 or over" exemption because 82% of the occupied units (80/98) at Valley Heights are occupied by at least one person 55 years old or older. If John and Mary are accepted for occupancy, then 81 out of the 99 occupied units (82%) will be occupied by at least one person who is 55 years of age or

older and Valley Heights will continue to qualify for the "55 or over" exemption.

B. If only 78 out of the 98 occupied units had been occupied by at least one person 55 years of age or older, Valley Heights would still qualify for the exemption, but could not rent to John or Mary if they were both under 55 without losing the exemption.

Example 2: Green Meadow is a 1,000 unit retirement community that provides significant facilities and services specifically designed to meet the physical or social needs of older persons. On September 13, 1988, Green Meadow published and thereafter adhered to policies and procedures demonstrating an intent to provide housing for persons 55 years of age or older. On September 13, 1988, 100 units were vacant and 300 units were occupied only by people who were under 55 years old. Consequently, on September 13, 1988 67% of the Green Meadow's occupied units (600 out of 900) were occupied by at at least one person 55 years of age or older. Under paragraph (d)(1) of this section, Green Meadow qualifies for the "55 or over" exemption even though, on September 13, 1988, under 80% of the occupied units in the housing facility were occupied by at least one person 55 years of age or older per unit, provided that at least 80% of the units that were occupied after September 13, 1988 are occupied by at least one person 55 years of age or older. Under paragraph (d) of this section, Green Meadow qualifies for the "55 or over" exemption, even though it has unoccupied units, provided that at least 80% of its unoccupied units are reserved for occupancy by at least one person 55 years of age or over.

Example 3: Waterfront Gardens is a 200 unit housing facility to be constructed after March 12, 1989. The owner and manager of Waterfront Gardens intends to operate the new facility in

accordance with the requirements of this section. Waterfront Gardens need not comply with the requirement in paragraph (c)(1) of this section that at least 80% of the occupied units be occupied by at least one person 55 years of age or older per unit *until* 50 units (25%) are occupied. When the 50th unit is occupied, then 80% of the 50 occupied units (*i.e.*, 40 units) must be occupied by at least one person who is 55 years of age or older for Waterfront Gardens to qualify for the "55 or over" exemption.

* * *

Subpart E—Housing for Older Persons

The Fair Housing Act prohibits discrimination because of familial status. However, the Act exempts "housing for older persons" from the prohibitions against discrimination because of familial status. The purpose of the prohibitions against discrimination because of familial status and the housing for older persons exemption is to protect families with children from discrimination in housing, without unfairly limiting housing choices for elderly persons. 134 Cong. Rec. S10465-66 (daily ed. August 1, 1988) (statement of Sen. Karnes). The statutory definition of *housing for older persons* comprises three categories of housing: (1) Housing provided under any State or Federal program that the Secretary of HUD determines is specifically designed and operated to assist elderly persons; (2) housing intended for, and solely occupied by, persons 62 years of age or older; and (3) housing intended for, and solely occupied by, at least one person 55 years of age or older per unit, provided that various criteria are met.

* * *

Appendix F

Section 100.304 55 or Over Housing.

Section 100.304 implements section 807(b)(2)(C) of the Fair Housing Act, which exempts housing intended and operated for occupancy by at least one person 55 years of age or over per unit that satisfy certain criteria. This section of the proposed rule was the subject of many public comments. As an initial matter, a number of commenters asked that the Department clarify the meaning of the phrase "housing intended and operated for occupancy *by at least one person* 55 years of age or older, per unit * * * " in paragraph (a).

Specifically, these commenters asked that HUD address the issue of the age of any other person occupying the unit along with a person 55 years of age or older per unit. A housing provider may use any non-discriminatory method of qualifying for the exemption that comports with applicable State and local laws. Since the Fair Housing Amendments Act does not prohibit discrimination because of age, nothing in the Act prohibits a housing provider seeking to qualify for the exemption for "55 or over" housing from setting age restrictions that are *more* stringent than those set forth in the Act. Thus, a housing provider *may,* for example, require that *all* residents be 55 years of age or older, provided that such a rule is consistent with applicable State and local laws. The other comments on § 100.304 fall within four areas.

First, some commenters stated that § 100.304(c)(1) should state that all units, upon initial occupancy, must be occupied by at least one person 55 years of age or older. Under the Act, the exemption for housing for persons 55 years of age or older requires, among other things, that 80 percent of the dwellings have at least one resident who is 55 years of age or older *and* that the housing complex adhere to policies demonstrating an intent to

provide housing to persons of that age group. Section 807(b)(2)(C). The Children's Defense Fund and other commenters state that Congress' purpose in permitting up to 20 percent of the units to be occupied solely by persons under the age of 55 was to prevent disruption of the lives of surviving spouses and cohabitants under age 55, when the over 55 member of a household dies or otherwise leaves the unit. *See* 134 Cong. Rec. H 6498 (daily ed. August 8, 1988) (statement of Representative Edwards); House Report at 31. Specifically, these commenters argue that the "55 or over" exemption was not meant to permit the owner of housing for older persons to "set aside" 20 percent of its units for *incoming* households (as opposed to surviving spouses or companions). These commenters feel that such a "set aside" is inconsistent with the exemption's requirement that the owner or manager demonstrate an intent to provide housing for persons 55 years of age or older.

These commenters correctly point out that statements in the legislative history discuss the need to permit up to 20 percent of the units to be occupied by persons all of whom are under 55 years old in 55 or over housing in order to accommodate persons such as surviving spouses under the age of 55 and nurses and other personnel to care for the elderly. 134 Cong. Rec. H 6498 (daily ed. August 8, 1988) (statement of Representative Edwards); House Report at 31. However, the Department does not believe that the examples that appear in the legislative history were intended to be exhaustive. Particularly, the Department is not of the view that these units for persons under 55 years of age cannot be occupied by *incoming* households (as opposed to surviving spouses or companions). Indeed, some incoming households may be persons under 55 related in some way to residents who are over 55 years old. For example, an elderly owner of a condominium might die and leave the condominium to a relative who is under 55 years old.

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If the 20 percent of the units available to persons under 55 years old were not open to incoming households then the recipient of the legacy would be in the anomalous situation of not being able to live in a condominium he or she owns. Further, the Department does not believe that the proposed rule can fairly be characterized as establishing a 20 percent "set-aside" for persons under 55 years of age. In order to be assured of preserving the exemption, an owner of "55 or over" housing will not, as a practical matter, be able to sell or rent a full 20 percent of the units to incoming persons, all of whom are under 55 years of age, because if the owner does so he or she will risk losing the exemption if some of the over-55 occupants die with surviving spouses who are under 55 years old. In this regard, a number of commenters expressed concern about the last sentence of example 1A in paragraph (e). This sentence indicates that a housing provider could rent a unit to persons (John and Mary in the example) all of whom are under 55 years old even if doing so would reduce the percentage of units occupied by at least one person 55 years of age or older to just a fraction above 80 percent. Although the housing provider in fact could rent to John and Mary without losing the "55 or over" exemption the Department agrees that doing so is not advisable under the circumstances described in the example. Since the owner would be just a fraction above the 80 percent minimum required to maintain the "55 or over" exemption, renting to John and Mary could lead to the owner losing the exemption if some of the over-55 occupants die with surviving spouses who are under 55. In order to avoid any confusion therefore, the last sentence of example 1A in paragraph (e) of the proposed rule has been deleted in the final rule.

Beyond this, the owner must take care to publish and adhere to policies and procedures which demonstrate an intent to provide housing for persons 55 years of age or older. For example, this requirement would preclude an owner or manager from marketing

80 percent of the units for persons 55 years of age or older and marketing the remaining 20 percent in a radically different way (*e.g.*, young adults). The policies and procedures for the housing facility *as a whole* must demonstrate an intent to provide housing for persons 55 years of age or older. "In essence, this means that the housing in question must in its marketing to the public and in its internal operations, hold itself out as housing for persons aged 55 or older." 134 Cong. Rec. S10456 (Memorandum of Senators Kennedy and Specter Regarding Their Substitute Amendment). Accordingly, the Department has determined not to revise paragraph (d)(2).

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